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Taxing Personhood: Estate Taxes and the Compelled Commodification of Identity

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TAXING PERSONHOOD: ESTATE TAXES AND THE COMPELLED COMMODIFICATION OF IDENTITY

Ray D. Madoff *

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I. INTRODUCTION

Famous people respond to their celebrity status in a variety of ways. Some, like Howard Stern, the shock-jock radio personality, seem to revel in their role as a celebrity and treat their celebrity status as a marketable commodity.[1] Others, like J.D. Salinger, author of *The Catcher in the Rye,*[2] treasure their privacy and bear their celebrity status like a burden.[3] While they may recognize the

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[1] Howard Stern, the self-crowned "King of All Media," has used his "shock jock" radio persona to infiltrate all media outlets. His five-hour New York-based morning radio show has an estimated ten to fifteen million listeners in thirty-five cities. A half-hour version of the radio show is broadcast on the E! cable television network. Stern has also published two books, *Private Parts* and *Miss America*. Stern's recent promotion of the movie version of *Private Parts*, in which he starred, was an all-out media blitz, including appearances on MTV, David Letterman, the Today Show and the Tonight Show, and articles in *Entertainment Weekly, Newsweek, Rolling Stone, The New Yorker* and *TV Guide*. At the Cannes Film Festival Stern used the movie's promotion to reach a global audience, a marketing scheme that included a forty-foot inflated likeness of Stern on a barge. *See Howard Stern Takes Cannes by Storm: 'Private Parts' Star Using the Festival to Get Global Fame*, State J. Reg. (Springfield, Ill.), May 16, 1997, at 20; Bruce Handy, *What Private Parts?*, Time, March 10, 1997, at 95; Bill Keveney, *Big Mouth Goes Big Screen, Howard Stern: the Consummate Self-Promoter*, Hartford Courant, March 5, 1997, at E1; Rick Martin, *Miss Congeniality*, Newsweek, March 3, 1997, at 58; Dan Vierria, *Howard Stern: Seen But Not Heard*, Sacramento Bee, March 7, 1997, at SC1.

[2] J.D. Salinger, *The Catcher in the Rye* (1951).

[3] Until very recently, the 78 year old Salinger had not been heard from since he was last published 32 years ago. Intensely protective of his privacy, Salinger lives quietly in rural

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market potential that their celebrity status offers, for all practical purposes they deny its existence as a commodity.

Unfortunately, our systems of taxation vary in their ability to respond to these highly personal decisions. While the income tax system respects the different choices made by these individuals by taxing Stern on the large amount of income his marketing generates and by not taxing Salinger on the income he could generate from marketing his celebrity, the estate tax system in its current form is incapable of recognizing the validity of the decision not to treat celebrity status as a commodity. Instead, under the estate tax system, both the Stern and Salinger estates will be subject to tax on the value of all assets owned at the time of death. Assuming they live in jurisdictions which recognize a descendible right of publicity,[4] included in each of their estates will be the value of the decedent's name and likeness. For the Stern estate, this amount will be high in recognition of the market value encouraged by Stern during his life. Ironically, the value of Salinger's name will also be high (perhaps even higher than Stern's) in recognition of the scarce use of the Salinger name during life.[5] Moreover, while

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Cornish, New Hampshire and is generally hostile to commercial culture. With the exception of the adaptation of his short story *Uncle Wiggily in Connecticut* into the 1950 film *My Foolish Heart*, Salinger has refused all requests for adaptation or anthologizing. His books are generally printed with no cover illustration and no photo of the author. Until this year Salinger's contacts with the public had been limited to legal attempts to safeguard his privacy. He successfully sued to keep excerpts of his letters out of his biography, Ian Hamilton, *In Search of J.D. Salinger* (1989). More recently his attorneys have persuaded fans to remove quotations from Salinger's works and letters from their web sites. *See Salinger v. Random House, Inc.*, 811 F.2d 90, 92 (2d Cir. 1987); John Blades, *A New Puzzle from the Author No One Knows*, Chic. Trib., February 26, 1997, § 5 at 1; Lois Blinkhorn, *Playing Hide and Seek with Elusive J.D. Salinger*, St. Louis Post Dispatch, March 9, 1997, at 3D; Fred Bruning, *J.D. Salinger to Publish First Book in 34 Years*, Montreal Gazette, January 18, 1997, at E4; Jerome Weeks, *J.D. Salinger: New Book, Old Mystery*, Dallas Morning News, March 30, 1997, at 1C.

[4] Since the right of publicity has only recently been recognized as a property right, the law in this area is still evolving. However, already fourteen states explicitly recognize the descendibility of the right of publicity. *See infra* note 58 and accompanying text.

[5] The high market value of the Salinger name is evidenced by public response to the January, 1997 announcement that *Hapworth 16, 1924*, a novella written by Salinger that had been printed only in a 1965 issue of *The New Yorker*, will be published by the obscure Orchises Press. This first public sign from Salinger in decades captured the attention of the book world; for several weeks in February advance orders for *Hapworth* made on the on-line

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the Stern estate will have plenty of other assets available to pay any taxes owed on the value of the Stern name, the Salinger estate will more likely be forced to sell the name in order to generate the cash necessary to pay the tax liability.[6]

On one level, this discrepancy can be understood as merely the difference between a system that taxes income and one that taxes transfers of wealth. On a more sophisticated level, however, this difference reflects a far more fundamental discrepancy between the two systems of taxation, one that exists in both the statutes and the scholarship.

The estate tax has always been unsophisticated by comparison to the income tax. While the income tax contains a complex set of rules distinguishing between different types of income,[7] the estate tax has basically one rule: all property owned at death is subject to tax at the property's highest market value. In the income tax area, considerable scholarly attention has been focused on the appropriate scope of the income tax base.[8] By contrast, scholarship in the estate tax area has tended to focus on the more general question of whether the estate tax should be repealed.[9] In

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bookstore Amazon.com outnumbered orders for such blockbusters as *The English Patient* and Michael Crichton's *Airframe*. Blinkhorn, *supra* note 3; Weeks, *supra* note 3. The excitement over the publication of *Hapworth* is ironic as the novella received poor reviews at the time of its publication in *The New Yorker*. Critics agree that reader nostalgia for *The Catcher in the Rye* and the mystery surrounding Salinger and the circumstances of *Hapworth*'s publication are behind the attention the novella has received. Blades, *supra* note 3 at 3; Weeks, *supra* note 3.

6 The wide discrepancy between the value of an individual's right to publicity and his or her assets owned at the time of death is well illustrated by the estate of Elvis Presley. His estate was valued at less than $5,000,000 as of the date of death in 1977, yet the right of publicity helped swell the value of the estate to over $75,000,000 by 1990 with annual income of over $15,000,000. Paul L. Caron, *Estate Planning Implications of the Right of Publicity*, 68 Tax Notes (TA) 95 (July 3, 1995).

7 The distinction between ordinary and capital income is just one example in which different types of income are treated differently. Sections 71 through 137 of the Internal Revenue Code provide a panoply of rules applicable to different types of income.

8 *See, e.g.*, Henry C. Simons, *Personal Income Taxation: The Definition of Income as a Problem of Fiscal Policy* 50 (1938), Victor Thuronyi, *The Concept of Income,* 46 Tax L. Rev. 45 (1990) and J.B. McCombs, *An Historical Review and Analysis of Early United States Tax Policy Scholarship: Definition of Income and Progressive Rates*, 64 St. John's L. Rev. 471 (1990).

9 *See, e.g.,* Mark L. Ascher, *Curtailing Inherited Wealth*, 89 Mich. L. Rev. 69 (1990);
(continued...)

considering this question, scholars have recognized that the estate tax is imposed on all wealth transferred at death, but have regarded wealth as a monolithic construct, unvaried in its component parts.

Absent from the estate taxation debate has been a recognition of the varied nature of wealth and the disparate impact of estate taxes on different types of property interests. This article seeks to remedy this omission by focusing on the impact of estate taxes on those property interests that are closely aligned with an individual's identity. By so doing, my goal is to bring modern property theory and a more nuanced approach to the estate taxation debate.

Part II of this article looks at the blunt tools of the wealth tax and in particular how the estate tax uses a one-size-fits-all system to impose a tax on all property interests owned at the time of death. Part III looks at how these blunt tools can produce problematic results by examining their application to one of the many newly-recognized property interests, the right of publicity. In this part, I show how the imposition of the estate tax can force the commodification of an individual's identity, regardless of his desire not to have his identity marketed. In Part IV, I show how the income tax system respects human dignity in its treatment of human capital by adopting a more nuanced approach to the concept of income.

In Part V, I more closely examine the estate tax problem raised by the right of publicity and, in particular, how that problem results from the estate tax system's treatment of all wealth as fungible. This "myth of fungibility" is directly contrary to human experience. People's varying relationships to property have been recognized by modern property theorists, and in Part V, I look to these theories to provide direction for the development of the estate tax. I also show how the estate tax problem raised by the right of publicity occurs whenever there is a property interest recognized at law which, due to the property's connection to the identity of the

(...continued)
Michael J. Graetz, *To Praise the Estate Tax Not to Bury It*, 93 Yale L.J. 359 (1983); Henry J. Aaron and Alicia H. Munnell, *Reassessing the Role for Wealth Transfer Taxes*, 45 Nat'l Tax J. 119 (1992); Edward J. McCaffery, *The Uneasy Case for Wealth Transfer Taxation*, 104 Yale L.J. 283 (1994).

person, the owner does not want to treat as a marketable commodity. Finally, I explore ways in which the estate tax could begin to employ a more nuanced approach to wealth.

II. THE BLUNT TOOLS OF ESTATE TAXATION

Wealth taxation is most commonly thought of in terms of estate taxation. The estate tax is an excise tax imposed on the transfer of a decedent's property at death. In order to avoid evasion of the tax through lifetime transfers, the estate tax is reinforced by a gift tax which taxes transfers made during life.[10] These wealth transfer taxes are levied in addition to any income taxes that may be imposed on income earned during an individual's life.[11] After allowing for a number of exclusions and credits,[12] the wealth transfer tax system imposes a graduated tax rate of up to 55%.[13]

The estate tax frequently has a significant effect on the ability to retain property. The tax is imposed on the fair market value of all property interests owned at death. The executor or administrator of the estate is personally liable for the payment of all estate taxes.[14] If the estate has insufficient cash with which to pay the tax, the executor is required to liquidate assets of the estate.[15]

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[10] The unification of the estate and gift tax system was enacted as part of the Tax Reform Act of 1976, Pub. L. No. 94-455, § 2134(a), 90 Stat. 1520, 1926.

[11] The combined impact of these taxes is tempered somewhat by Section 102 of the Internal Revenue Code, which provides an exclusion from gross income for gifts and inheritances.

[12] The most significant of these is a unified credit which exempts $625,000 from transfer taxes. I.R.C. § 2010. The Taxpayer Relief Act of 1997 provides for an increase in this credit over the next nine years, providing for an exemption of $1,000,000 by 2006. *See* Pub. L. No. 105-34, § 501, 111 Stat. 778, 845-47 (1997).

[13] I.R.C. § 2001(b). The rates are graduated from 37% for transfers in excess of $500,000 to 55% for transfers in excess of $3,000,000. This tax is imposed on the combination of all taxable lifetime transfers as well as all transfers at death.

[14] Reg. § 20.2002-1 (1958). This duty applies with respect to the entire tax regardless of the fact that the gross estate consists in part of property that does not come within possession of the administrator.

[15] Although the executor is obligated to pay the federal estate tax, the source from which the tax is paid is generally a matter of state law. Many states follow the common law rule that calls for payment of the entire amount of tax from the decedent's residuary estate. Others have adopted rules that require the tax to be apportioned among the recipients of the

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The estate tax is commonly described as a tax on the privilege of transferring property at death.[16] Thus, the tests used to determine whether an interest will be subject to tax are: (1) whether the decedent owned an interest in property immediately before death and (2) whether the decedent had a right to transmit that interest at death.[17]

A. *Property Subject to Tax*

The estate tax imposes a tax on the value of all property owned or controlled by a decedent at death.[18] In doing so, the estate tax

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decedent's property. John R. Price, *Price on Contemporary Estate Planning* § 4.27.1 (1992).

[16] As Justice Holmes described it, the estate tax is

> [A] tax upon a transfer of his net estate by a decedent.... It comes into existence before and is independent of the receipt of the property by the legatee. It taxes... "not the interest to which some person succeeds on a death, but the interest which ceased by reason of the death."

Edwards v. Slocum, 264 U.S. 61, 62 (1924) (quoting *Knowlton v. Moore*, 178 U.S. 41, 49 (1899)).

[17] I.R.C. § 2033; *see also* Lewis D. Solomon, Ira Mark Bloom & John T. Gaubatz, *Federal Taxation of Estates, Trusts and Gifts* 71, 71-78 (1989).

[18] The starting point for estate taxation is the gross estate, which is defined as including the value of all property to the extent of the decedent's interest therein at the time of his death. I.R.C. § 2033. Regulations provide that this section covers virtually all property owned by the decedent at the time of death, "whether real or personal, tangible or intangible, and wherever situated." Reg. § 20.2033-1(a) (as amended 1963). The present version of § 2033 evolved from § 302(a) of the Revenue Act of 1926, ch. 27, § 302, 44 Stat. 9, 70 (1926). Before then, § 202(a) of the Revenue Act of 1916, ch. 463, § 202, 39 Stat. 756, 777 (1916), provided a more lenient rule: the gross estate included property "[t]o the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate." Inclusion thus depended on the uncertainties of state law. *See* H.R. Rep. No. 69-1, at 15 (1926); William P. Streng, *Estate Planning*, 800 Tax Mgmt. Portfolios (BNA), at A-7, nn. 37-9 (1997).

A number of provisions also require the inclusion of property that the decedent did not own at the time of death but which is regarded as having been owned because of strings attached to a lifetime transfer. These provisions include: § 2035, relating to certain inter vivos transfers made within three years before death; § 2036, relating to inter vivos transfers in which the decedent retained the income or beneficial enjoyment of the property during life; § 2037, relating to an inter vivos transfer in which the decedent retained a reversionary interest the value of which immediately before the decedent's death exceeds 5% of the value of the property transferred; § 2038, relating to an inter vivos transfer in which the decedent retained a power to revoke the transfer or the property at death was subject to a power exercisable by the decedent; § 2039, relating to an inter vivos transfer in which an annuity

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subjects an endless variety of property interests to tax, including liquid interests, like cash and securities, as well as illiquid interests, such as business interests, houses, automobiles, jewelry and works of art.[19]

The determination of whether the decedent has a property interest is a matter of state law.[20] However, the term "property" has generally been given a broadly expansive definition. For purposes of applying the estate tax it has been noted that "property" is an expansionist term. "Its mooring is contemporary rather than historical."[21]

It is widely recognized that the concept of property is not static, but changes to accommodate creative developments and novel legal

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or other payment is payable to the decedent during his or her life, with another annuity or payment payable to a survivor after the decedent's death; § 2041, relating to property that is subject to a general power of appointment exercisable by the decedent; and § 2042, relating to life insurance on the decedent's life in which the decedent has retained incidents of ownership over the policy. In addition, § 2040 includes in the decedent's gross estate property jointly owned by the decedent and any other person with a right of survivorship. I.R.C. §§ 2035 - 42; *see also* Streng, *supra,* at A-8.

19 Specific examples of property interests included under § 2033 include cash, securities, real estate, mortgages and other claims, unincorporated business interests and works of art. Property interests are included under § 2033 even if they are unliquidated, speculative, contingent or defeasible. Boris I. Bittker & Lawrence Lokken, 5 *Federal Taxation of Income, Estates and Gifts* ¶ 125-1 (2nd ed. 1984 & Supp. 1997). If a decedent was killed in a car accident, then included in her gross estate is the value of any claim that she may have against the driver of the car, *see, for example, Estate of Houston v. Commissioner*, 44 T.C.M. (CCH) 284 (1982), in which the court determined that one of the assets in the decedent's estate included a cause of action for the wrongful death of her husband. The court in *Houston* stated that "...a right of action is a property right. It constitutes a future interest coming within the term 'personal property,' and 'the fact that this property interest is intangible, uncertain as to amount, and not immediately subject to being reduced to possession, does not deprive it of value and transferability'." *Id.* at 287 (quoting *City of Holland v. Township of Fillmore*, 108 N.W. 2d 840 (1961)).

20 State law is conclusively determined, if at all, only by the highest court of the state; decisions of the lower court will only be given "proper regard." *Commissioner v. Estate of Bosch*, 387 U.S. 456 (1967).

21 *First Victoria Nat'l Bank v. United States*, 620 F.2d 1096 (5th Cir. 1980). The court went on to note:

> The attempt to define "property" is an elusive task. There is no cosmic synoptic definiens that can encompass its range. The word is at times more cognizable than recognizable. It is not capable of anatomical or lexicographical definition or proof. It devolves upon the court to fill in the definitional vacuum with the substance of the economics of our time.

Id. at 1102.

relationships.[22] For example, courts have recognized protected interests in trademarks, titles of literary works, the collection and dissemination of news, and ideas communicated in confidence or in reasonable expectation of consideration.[23] In addition, changes in technology have resulted in property interests where none before existed. For example, due to advances in reproductive technology, it is now possible to have a devisable property interest in one's sperm.[24]

The other requirement for inclusion in the gross estate is that the decedent had the right to transmit the property interest at death. Since the estate tax is nominally a tax on the privilege of transferring property at death, interests which cannot be transferred at death (*i.e.* which are not devisable or descendible) are not subject to the estate tax system. Property interests are not devisable or descendible when they terminate at death.[25] Life estates, for example, are not generally subject to the estate tax.[26]

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[22] *Lugosi v. Universal Pictures*, 603 P.2d 425, 443 (Cal. 1979) (Bird, C.J., dissenting). *See generally,* Justin Hughes, *The Philosophy of Intellectual Property*, 77 Geo. L.J. 287 (1988); John Edward Cribbet, *Concepts in Transition: The Search for a New Definition of Property*, 1986 U. Ill. L. Rev. 1.

[23] *Lugosi*, 603 P.2d at 443.

[24] The California Court of Appeals found that at the time of his death, a decedent had an interest, in the nature of ownership, in his cryogenically preserved sperm to the extent that he had decision making authority as to its use for reproduction and that such interest constituted property within the meaning of the probate code. Accordingly, the court held that frozen vials of the decedent's sperm should be released to his girlfriend as had been provided by his will. *See Hecht v. Superior Court*, 59 Cal. Rptr. 2d 222, 228 (Ct. App. 1996), *aff'g* 20 Cal. Rptr. 2d 275, 283 (Ct. App. 1993). See also *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479 (Cal. 1990), where although the court held that a patient did not have a property interest in a cell line that had been derived from his own tissues and cells, and thus could not assert a cause of action for conversion, the court left open the possibility of property interests in human cells, reasoning that "we do not purport to hold that excised cells can never be property for any purpose whatsoever." The court was reluctant to recognize a patient's property interest in the cell line for social policy reasons, including the potential for discouraging beneficial scientific research. *Id.* at 493; *see also* Judith B. Prowda, *Moore v. The Regents of the University of California: An Ethical Debate on Informed Consent and Property Rights in a Patient's Cells*, 77 J. Pat. & Trademark Off. Soc'y 611, 617 (1995).

[25] *See* Solomon et al., *supra* note 17, at 78.

[26] If the only interest which a decedent owns, and has ever owned, in property is an estate for his own life, nothing will be included in his gross estate because he owns no interest which he can transmit at his death. P.L.R. 79-49-021 (Aug. 27, 1979). Similarly, a remainder limited to the life of the remainderman or a remainder that divests if the remainderman predeceases the life tenant is not includible in the gross estate because the remainderman's

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Likewise, Social Security benefits are not subject to estate tax because the payment of death benefits is controlled by statute and not directed by the decedent.[27]

B. *Valuation for Estate Tax Purposes*

Once property is included in the gross estate, it must be valued. This valuation for estate tax purposes is as essential to the ultimate tax liability as the determination of inclusion.[28] Although the Internal Revenue Code itself provides no criteria for determining the value of property,[29] the regulations are clear. When valuing property for estate tax purposes, the property is valued at its "fair market value" at the time of the decedent's death.[30] The definition of fair market value for estate tax purposes is the same as that used for gift and income tax purposes: that is, "the fair market value is the price at which the property would trade hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts."[31]

(...continued)
interest terminates at his death. *Id.*

[27] *See* Rev. Rul. 67-277, 1967-2 C.B. 322. For other interests which are similarly treated see Rev. Rul. 76-501, 1976-2 C.B. 267 (dealing with veteran's benefits); Rev. Rul. 67-277, 1967-2 C.B. 322 (dealing with the Railroad Retirement Act); Rev. Rul. 79-397, 1979-2 C.B. 322 (dealing with the U.S. Public Safety Officers Benefits Act); and Rev. Rul. 56-637, 1956-2 C.B. 600 (dealing with state worker's compensation statutes). *See also* Richard B. Treanor, *Gross Estate--§ 2033*, 133 Tax Mgmt. Est., Gifts & Tr. J. (BNA), at iii (1997).

[28] The importance of valuation in tax settings was summed up by Randolph Paul and Philip Zimet nearly sixty years ago when they observed:

> It is a weary task to find fair market value; and it is a serious business. The result is not academic; it expresses itself in money deficiencies, which taxpayers are sometimes none [too] well able to afford to pay. It should not require prolonged argument to demonstrate the necessity for painstaking effort.

Randolph Paul & Philip Zimet, *Realistic Valuation for Federal Tax Purposes, in Studies In Federal Taxation* 159, 178-79 (Randolph Paul ed., 1937).

[29] Bittker & Lokken, *supra* note 19, ¶ 135.1.1.

[30] Reg. § 20.2031-1(b).

[31] Reg. § 20.2031-1(b). The same definition of fair market value is used for income, estate and gift tax purposes. John A. Bogdanski, *Federal Tax Valuation*, ¶ 2.01[1], at 2-4, n.1 (1996). The willing buyer-willing seller standard was criticized by a leading theorist of value in 1937, but this criticism never took hold and the standard was described with approval by

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This definition of fair market value has a number of notable features. Most importantly, the willing buyer and the willing seller envisioned by the regulations are not actual parties, but instead are hypothetical parties engaged in a hypothetical market.[32] Because the market is a hypothetical one, no actual market is required to determine fair market value. Thus, courts have stated that the fact that no buyers are presently extant does not make the fair market value zero.[33] Under this view all manner of unmarketable property has been assigned a fair market value for purposes of federal taxes. For example, if prior to death the decedent had a cause of action against someone, this claim would be assigned a value for estate tax purposes, even if the claim's outcome (or even its existence) was unknown at the time of death. This valuation occurs despite the fact that sales of such claims simply do not occur in the real world.[34]

The other notable feature of the hypothetical buyer and seller standard is that the judgment of the market prevails over that of the taxpayer or any other single individual, unless there is evidence that others would share that view.[35] Thus, a taxpayer's sentimental attachment is not generally taken into account in determining fair market value. As one court stated:

> [no element of fair market value exists] by reason of the fact that the [owner], because of his personal interest in farming, forestry or perhaps because of sentiment for an entity which for over fifty years has been a family corporation, would perhaps decline to

(...continued)
the Supreme Court as "nearly as old as the federal income, estate and gift taxes themselves." *United States v. Cartwright*, 411 U.S. 546, 551 (1973); Bittker & Lokken, *supra* note 19, ¶ 135.1.2.

[32] Bogdanski, *supra* note 31, ¶ 2.01[2][c][i], at 2-23. Some courts have gone so far as to say that the willing buyer and seller are not just hypothetical, but "mythical" figures. *See id.* at ¶2.01[2]c(ii), at 2-23, n.76 and the cases cited therein.

[33] *Id.* ¶ 2.01[5][c][1], at 2-109.

[34] *Id.* For examples of these cases see *id.* at 2-106, n.443. Even property that is not legally salable has a fair market value under the hypothetical buyer and seller standard. Thus, in a Technical Advice Memorandum the Internal Revenue Service ruled that a decedent who died owning 662 1/2 pounds of marijuana was subject to estate tax based on the retail street value of the drugs. T.A.M. 92-07-004 (Oct. 21, 1991).

[35] Bogdanski, *supra* note 31, ¶ 2.01[2][c][ii], at 2-26.

> sell except for a price higher than commanded by commercial considerations.[36]

This focus on the market can also result in higher valuations due to the property's previous ownership or "celebrity value." As one commentator has stated, "[w]hat is sought is not the property's fair, normal or inherent value, but its fair market value—with emphasis on "market."[37] This concept is referred to in tax parlance as the property's "highest and best use." The meaning of the term "highest and best" is the use which would produce the greatest market return. As the Internal Revenue Service says in its Examination Technique Handbook for Estate Tax Examiners:

> Inherent in this definition [of fair market value] is the requirement that the highest and best use of the property be considered. Highest and best use is defined as that reasonable and probable use that will support the highest present worth of the (improved) property as of the assessment date based on the highest net return that it can produce over a reasonably foreseeable period of time, such as the property's probable remaining useful life. Thus the use of land for farming purposes might not be its highest and best use if it were located within a good business area or within a substantial residential development area.[38]

There is one exception to this rule that all property must be valued at its highest and best use, and that is that real property used as a family farm or in a closely held business may be valued at its actual current use rather than at its highest and best use.[39] Thus, if farmland is worth $400,000 as farmland, but would be worth $1,000,000 to a developer to develop the land for condominiums, then provided certain conditions are met, the estate may value the land at its $400,000 farmland value, rather than at

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[36] *Whittemore v. Fitzpatrick*, 127 F. Supp. 710, 716 (D. Conn. 1954).

[37] Bittker & Lokken, *supra* note 19, ¶ 135.1.2.

[38] *Examination Technique Handbook for Estate Tax Examiners*, I.R.M.M.T. 4350-31, Ch. 600 (1987), *reprinted in* Michael F. Beausang, Jr., *Valuation: General and Real Estate*, 132-3rd Tax Mgmt. Est., Gifts & Tr. Portfolios (BNA), at B-1001 (1986).

[39] I.R.C. § 2032A.

its $1,000,000 "highest and best use" value as a condominium development.[40]

C. *Estate Tax as Property Tax*

The estate tax is consistently described not as a tax on the decedent's property owned at death, but instead as a tax on the privilege of transmitting such property. The reason for this distinction is that a tax on the decedent's property would be a direct tax and under Article 1, Section 9, of the Constitution, such direct taxes are constitutional only if they are apportioned among the states by population.[41] By taxing the privilege of transferring property instead of the property itself, the tax passes constitutional muster without meeting the apportionment requirement. The Supreme Court has consistently held that a tax imposed on a particular use of property or the exercise of a single power over property incidental to ownership is an excise tax, not a direct tax.[42] Following this, the Supreme Court has held that gift and estate taxes are not direct taxes because they merely impose a tax on the transfer of property.[43]

This distinction, though important for constitutional analysis, has little practical effect. The reason for this is that although the tax is technically on the "privilege" of transmitting property, this privilege is one which is foisted upon the taxpayer with respect to all property owned at the time of death. Thus the tax is imposed regardless of whether the decedent specifically directs the transmission of property by writing a will, the property passes by intestacy, or the property escheats to the state.[44] It is impossible to

[40] The benefits under § 2032A are limited to a reduction in value of no more than $750,000. I.R.C. § 2032A(a)(2). For a more detailed discussion of § 2032A see *infra* notes 158-163 and the accompanying text. The Taxpayer Relief Act of 1997 added a similar provision for family owned businesses. I.R.C. §2033A.

[41] Income taxes need not meet this apportionment requirement since they are specifically authorized by the Sixteenth Amendment. U.S. Const. amend. XVI.

[42] James R. Repetti, *Minority Discounts: The Alchemy in Estate and Gift Taxation*, 50 Tax L. Rev. 415, 482 (1995).

[43] *N.Y. Trust Co. v. Eisner*, 256 U.S. 345, 348-50 (1921).

[44] Escheat of a decedent's property to the state for lack of heirs is a transfer which causes

(continued...)

opt out of this "privilege" of transmitting property. Even if a decedent directs that all of her assets be destroyed upon her death, her estate will nonetheless be subject to estate taxes on the value of those assets.[45]

D. *Estate Taxes and the Market*

All areas of the federal tax system use the market for purposes of calculating the base upon which a given action will be subject to tax.[46] Thus, if computer skills are highly valued in the market such that the salary of a computer programmer is high, then that higher salary will result in a larger income tax liability. If the market does not value as highly the work of a grade school teacher, then that will result in a lower salary which will be reflected in a lower income tax liability. Similarly, if a taxpayer transfers one-hundred shares of a very hot stock that is trading at $100 a share, then that will result in a larger gift tax liability than if the taxpayer transfers one-hundred shares of a stock that is valued at only $1 per share. However, the relationship between the estate tax and the market is unique since the estate tax operates essentially as a property tax.

Take the situation of the person who long ago bought a painting from a struggling art student for $100. As time passes, and as the painter's reputation grows, the value of the painting rises dramatically to the point where it is now worth $1,000,000. Under the income tax system, the value of the painting will not be subject to tax until such time as the taxpayer sells or exchanges the painting for something else of value.[47] This is due to the realization principle applicable to income taxes which provides generally that no gains will be recognized for tax purposes unless such gains are realized.[48] Under the gift tax system the value of the painting will not be subject to tax unless the donor transfers the property by gift.

(...continued)
the property to be included in the decedent's gross estate. Reg. § 20.0-2(a).

[45] *See* discussion *infra* notes 97-104 and accompanying text.

[46] The term "fair market value" appears in two-hundred five sections of the Internal Revenue Code.

[47] I.R.C. § 61.

[48] *See* I.R.C. § 1001 and the regulations thereunder.

Both of these systems only come into play upon some voluntary action by the taxpayer. This is very different from what happens under the estate tax system. Under that tax system, upon the collector's death, an unavoidable event, the full fair market value of the painting will be subject to tax even if there are no plans to sell it. The only "action" that is required by the taxpayer is dying.

The corollary to this imposition of a property tax based on market values is that the estate will frequently be forced to sell property of the estate in order to pay the tax. Indeed, since most estates consist largely of property other than cash, the executors of most estates will be required to sell a portion of the estate's assets in order to pay the tax liability.

III. ESTATE TAXES AND THE RIGHT OF PUBLICITY

It has been noted that property is an expansionist concept, changing to accommodate broader changes in society. However, what has gone largely unnoticed is how, by force of the blunt tools of the estate tax, every expansion of the concept of property has resulted in an expanded application of the estate tax. In this part, I consider some of the implications of this expansion by examining the application of the estate tax to one of the more recently recognized property rights: the right of publicity.

A. *The Right of Publicity*

The right of publicity is the right of an individual to own, protect and profit from the commercial value of his or her name, picture, and likeness and to prevent others from unfairly appropriating this value for their commercial benefit.[49] The right of publicity is most commonly used by celebrities to keep others from exploiting their identities for commercial purposes. For example, the right of publicity was used by Johnny Carson to enjoin Here's Johnny Portable Toilets, Inc, from using his name without

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[49] *See Haelan Lab., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953) (unauthorized use of photographs of prominent baseball players who had previously licensed the exclusive use of their pictures of plaintiffs violated players' "right to publicity."); *see also* Jonathan L. Kranz, *Sharing the Spotlight: Equitable Distribution of the Right of Publicity*, 13 Cardozo Arts & Ent. L.J. 917, 934 (1995).

his permission[50] and by Bette Midler to enjoin Ford Motor Company from using a singer who sounded like her in a commercial without her permission.[51]

The right of publicity was originally conceived of as part of the right of privacy.[52] However, the right of publicity in its current form differs from the right of privacy in one significant respect: whereas the right of privacy is grounded in the protection of personal feelings, the right of publicity was established in recognition of the economic value of a person's celebrity status.[53] As Melville Nimmer wrote in his influential article in 1954:

> With the tremendous strides in communications, advertising, and entertainment techniques, the public personality has found that the use of his name, photograph, and likeness has taken on a pecuniary value undreamed of at the turn of the century. Often, however, this important value (which will be referred to in this article as publicity value) cannot be legally protected either under a privacy theory or under any other traditional legal theory.[54]

The right of publicity was first recognized as separate and distinct from the right of privacy in 1953, in *Haelan Laboratories v.*

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[50] *Carson v. Here's Johnny Portable Toilets, Inc.*, 498 F. Supp. 71 (E.D. Mich. 1980), *aff'd in part and rev'd in part,* 698 F. 2d 831 (6th Cir. 1983) (affirming dismissal of unfair competition and privacy claims and reversing dismissal of publicity claim). On remand, the district court enjoined the defendant from using the phrase "Here's Johnny" and the Sixth Circuit affirmed, 810 F.2d 104 (6th Cir. 1987).

[51] *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988). In a similar case, Tom Waits sued Frito-Lay for using a singer who sounded like him. *Waits v. Frito-lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992). Likewise, Vanna White sued Samsung to enjoin a commercial in which a robot turned letters on a set that looked like Wheel of Fortune, the game show on which White appears. *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992). *See* VLA Symposium, *Identity Crisis: A Vision for the Right of Publicity in the Year 2020,* 20 Colum.-VLA J.L. & Arts 1 (1995).

[52] The right to publicity is rooted in the right to privacy which first received widespread attention in 1890 when Samuel Warren and Louis Brandeis wrote their seminal article *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890). Although the article was written as if it were describing a pre-existing phenomenon, the article is widely regarded as having given birth to the right of privacy. *See* Mary C. Slough, *Privacy, Freedom and Responsibility* 27-42 (1969).

[53] *See* Melville B. Nimmer, *The Right of Publicity*, 19 Law & Contemp. Probs. 203, 204 (1954).

[54] *Id.*

Topps Chewing Gum, Inc.[55] In that case, baseball players had granted the plaintiff chewing gum company the exclusive right to use the players' pictures on baseball cards. Subsequently, the defendant chewing gum company produced its own baseball cards with pictures of the players who had assigned their rights to the plaintiff. Although New York had a statutory right of privacy at that time, it did not afford a remedy to the plaintiff since the right of privacy was personal to the baseball players and unassignable. Understood in this way, the original contract with the plaintiff would be no more than a release of the players' right to sue for use of their photographs. Rejecting this analysis, the court instead characterized the players' interests in their images as a property interest which was thus capable of assignment:

> We think that in addition to and independent of that right of privacy... a man has a right in the publicity value of his photograph. ... Whether it be labeled a "property" right is immaterial; for here, as often elsewhere, the tag "property" simply symbolizes the fact that courts enforce a claim which has pecuniary worth.
>
> This right might be called a "right of publicity." For it is common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways. This right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their pictures.[56]

Once the right of publicity was recognized as a property right, it assumed other attributes of property; most notably, assignability

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[55] 202 F.2d 866 (2d Cir. 1953).

[56] *See Haelan*, 202 F.2d at 868; Kenneth E. Spahn, *The Right of Publicity: A Matter of Privacy, Property, or Public Domain?*, 19 Nova L. Rev. 1013, 1023 (1995).

and descendibility.[57] Currently, the descendibility of the right of publicity is recognized explicitly by statute or common law in fourteen states.[58] Moreover, the law of seven states has been interpreted to include the right of publicity as a property right from which one might infer, at least tentatively, that the right is descendible.[59] Only three states appear to specifically preclude, as a matter of statute or common law, a post-mortem right of publicity.[60]

Some jurisdictions which recognize a descendible right of publicity require that the deceased recognize the extrinsic commercial value of his name or likeness during his lifetime and

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[57] *Reeves v. United Artists*, 572 F. Supp. 1231, 1234 (N.D. Ohio 1983), *aff'd*, 765 F.2d 79 (6th Cir. 1985); *Maritote v. Desilu Prods.*, Inc., 345 F.2d 418, 419 (7th Cir. 1965); Spahn, *supra* note 56 at 1023-25.

[58] Nine states have passed post-mortem right of publicity statutes: California (Cal. Civ. Code § 990 (West 1992)), Florida (Fla. Stat. Ann. § 540.08 (West 1988)), Kentucky (Ky. Rev. Stat. Ann. § 391.170 (Michie 1984)), Nebraska (Neb. Rev. Stat. §§ 20-202, 20-208 (1983)), Nevada (Nev. Rev. Stat. § 598.980-988 (1989)), Oklahoma (Okla. Stat. Ann. tit. XII, § 1448 (West 1985), Tennessee (Tenn. Code Ann. § 47-25-1101 to 1105 (1984)), Texas (Tex. Prop. Code Ann. § 26.001-015 (West 1987)), and Virginia (Va. Code Ann. § 8.01-40 (Michie 1984)). The law of five other states has been expressly interpreted, either in state or federal court, to include a common law post-mortem right of publicity: Arizona (*Sinkler v. Goldsmith*, 623 F. Supp. 727, 734 (D.Ariz. 1985)); Connecticut (*Jim Henson Prods., Inc. v. John T. Brady & Assocs., Inc.*, 867 F. Supp. 175, 189-90); Georgia (*Martin Luther King, Jr., Ctr. for Social Change v. American Heritage Prods.*, 296 S.E.2d 697 (Ga. 1982)); New Jersey (*Gleason v. Hustler*, 7 Media L.Rep. (BNA) at 2183 (D.N.J. 1981)); and Utah (*Nature's Way Prods., Inc. v. Nature-Pharma, Inc.*, 736 F. Supp. 245 (D.Utah 1990)).

[59] Colorado (*Pam Media, Inc. v. American Research Corp.*, 889 F. Supp. 1403, 1409 (D.Co. 1995) (assuming that a Colorado court would recognize the right of publicity, court grants summary judgment to defendants as plaintiff has failed to show that defendants attempted to exploit celebrity's persona for their commercial benefit)); Michigan (*Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d at 831); Minnesota (*Ventura v. Titan Sports, Inc.*, 65 F.3d 725, 730 (8th Cir. 1995), *cert. denied*, 116 S.Ct. 1268 (1996)); Missouri (*Cepeda v. Swift & Co.*, 415 F.2d 1205 (8th Cir. 1969)); Oregon (*Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989)); Pennsylvania (*Seale v. Gramercy Pictures*, 949 F. Supp. 331, 336 (E.D. Pa. 1996)); and Wisconsin (*Hirsch v. S.C. Johnson & Son, Inc.*, 280 N.W.2d 129 (Wis. 1979)).

[60] Illinois (*Maritote*, 345 F.2d at 418 (estate and relatives of Al Capone could not maintain cause of action resulting from commercial exploitation of decedent in commercially televised fictional broadcasts after his death as right of privacy cannot be asserted by anyone other than person whose privacy is invaded; no independent common law right of publicity exists)); New York (*Stephano v. News Group Publications, Inc.*, 474 N.E.2d 580, 584 (N.Y. 1984) (right to protect one's identity from commercial exploitation is protected by New York right of privacy statute; no independent common law right of publicity exists)); Ohio (*Reeves v. United Artists*, 572 F. Supp. 1231, 1235 (N.D. Ohio 1983) (under Ohio law, the right of publicity is linked with the right of privacy and therefore the right of publicity, like the right of privacy, is not descendible)).

manifest that recognition by exploiting his celebrity or by assigning his right to it to someone else.[61] However, other jurisdictions reason that the theories underlying recognition of the right of publicity are not served or are even disserved by imposing such a requirement.[62] The reason for this is a recognition that the right to publicity protects individuals who choose not to exploit themselves on the market as well as those who choose to do so. For example, in *Martin Luther King, Jr., Center for Social Change, Inc.*, the Sixth Circuit reasoned that:

> [A] person who avoids commercial exploitation is entitled to have his image protected against exploitation after death just as much if not more than a person who exploited his image during life.
>
> Without doubt, Dr. King could have exploited his name and likeness during his lifetime. That this opportunity was not appealing to him does not mean that others have the right to use his name and likeness in ways he himself chose not to do. Nor does it strip his family and estate of the right to control, preserve and extend his status and memory and to prevent unauthorized exploitation thereof by others. Here, they seek to prevent the exploitation of his likeness in a manner they consider unflattering and unfitting. We cannot deny them this right merely because Dr. King chose not to exploit or commercialize himself during his lifetime.[63]

Since the estate tax system imposes a tax on all state recognized property interests transmittable at death, whenever the right of publicity is treated as a descendible right, it is subject to tax in a decedent's estate at its highest fair market value under basic estate tax principles.

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[61] Arizona (*Sinkler v. Goldsmith*, 623 F. Supp. at 734); Colorado (*Pam Media, Inc. v. American Research Corp.*, 889 F. Supp. at 1409); New Jersey (*Gleason v. Hustler*, 7 Media L. Rep. (BNA) 2183); and Utah (*Nature's Way Prods. v. Nature-Pharma, Inc.*, 736 F. Supp. at 245).

[62] *See Martin Luther King, Jr., Ctr. for Social Change*, 296 S.E.2d at 706; *Lugosi v. Universal Pictures*, 603 P.2d 425, at 447.

[63] *See Martin Luther King, Jr., Ctr. for Social Change*, 296 S.E.2d at 706.

B. The Case of V.C. Andrews

The first case on record in which the estate tax rules were applied to the right of publicity was a case involving the author V.C. Andrews.[64]

Virginia C. Andrews was an internationally known author of paperback books, specializing in the genre known as "children in jeopardy."[65] Between 1978 and her death in 1986 Andrews wrote seven best-selling novels in this genre.[66] At the time of her death, Andrews was at the height of her popularity and was in the process of entering into a contract with her publisher to write two more books.[67]

Due to the success of Andrews' earlier works, her editor was very interested in publishing more books under the V.C. Andrews name. An attempt was made to find authors who could successfully recreate Andrews' style to ghostwrite books, culminating in the hiring of Andrew Neiderman.[68] By 1990 Neiderman had produced five novels in Andrews' style published under the Andrews name, all of which enjoyed tremendous commercial success.[69]

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[64] *See Estate of Andrews v. United States*, 850 F. Supp. 1279 (E.D. Va. 1994).

[65] Books written in this genre typically feature a teenage protagonist who is failed by an adult yet overcomes this and other forms of adversity. *See id.* at 1281.

[66] *Id.*

[67] *Id.* at 1282.

[68] The first attempt to recreate Andrews' style was made by someone intimately familiar with Andrews' work, her editor, Ann Patty. *Id.* at 1282-1283. Patty had edited all of Andrews' work and had even written the editorial revisions for Andrews' last book. *Id.* at 1283. Nonetheless, her attempt at recreating Andrews' style in a new work was rejected by the publisher as a total failure. *Id.* at 1281. Thereafter, another writer, Andrew Neiderman (an obscure author of horror books), attempted the task of recreating Andrews' style. *Id.* Lacking Patty's familiarity with Andrews' work, Neiderman took a more technological approach; he read all of Andrews' previous works, entered the texts of those works into a computer and had the computer analyze Andrews' writing style, plot style and character development techniques. *Id.* Based on this analysis, Neiderman successfully prepared an outline and several pages of ghostwritten text in Andrews' style. *Id.* The publishers approved of Neiderman's work and entered into a contract with him to write two books to be published under the name of V.C. Andrews. *Id.* at 1283-84. The first book written by Neiderman under the Andrews name was so successful that a contract was entered into for several more books. *Id.* at 1284.

[69] *Id.*

All of the books were marketed under Andrews' name with no acknowledgment of Neiderman's contribution.[70] The intent of the publishers was to maintain the illusion that Andrews had written these works prior to her death.[71]

When Andrews' executors filed the estate tax return, her name was not listed as an asset of the estate.[72] This is not surprising, since most people do not think of a name as property and since prior to *Andrews*, there had never been a reported decision involving a person's name as an asset of the estate.[73] However, it was to be expected that once the issue was raised, the Internal Revenue Service would be successful in its attempt to include the value of the name in the estate since this result follows directly from basic estate tax principles.[74] The tests used to determine whether an interest is subject to tax were clearly met since, by statute, Virginia recognized a descendible property interest in the right of publicity.[75] Moreover, the Andrews estate could not argue

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[70] Under the terms of Neiderman's contract, he was prohibited from disclosing that he had ghostwritten the Andrews books. *Id.*

[71] Andrews' death was not confirmed to her audience until the publication of the fifth book ghostwritten by Neiderman under Andrews' name and even then readers were led to believe that the stories had been largely completed by Andrews before she died. *See id.* at 1284-85.

[72] *Id.* at 1281.

[73] *Id.*

[74] Although the executors originally tried to argue that Andrews' name and likeness should not be treated as an asset of Andrews' estate, the court noted that "[w]isely, the Estate has foresworn that argument." *Id.* at 1287.

[75] Va. Code Ann. § 8.01-40 (Michie 1984). The issue of taxation of the right of publicity has received very little attention to date because it is only recently that states have begun recognizing a descendible right of publicity. Moreover, it is only recently that changes in technology have resulted in new post-mortem opportunities. Death used to bring with it a much greater level of finality. When Charles Dickens died in the midst of writing *The Mystery of Edwin Drood*, the identity of the murderer remained a mystery. That mystery was solved nightly in the 1985 production of the play based on the book, in which each night the audience would vote for a different ending. *See* Enid Nemy, *Killer of an Idea for Dickens: Play's Ending Up to the Fans*, S.F. Chron., May 8, 1985, at 60. Similarly, if an actor died in the midst of making a movie, the movie would be recast or the script rewritten to take into account the departure. For example, when Natalie Wood died during the making of *Brainstorm*, the script was rewritten. *See* Roger Catlin, *Brainstorm Film Called a Visual Feast*, Omaha World-Herald, Oct. 3, 1983, *available* 1983 WL 2099368.

However, with advancing technology, death no longer provides the same obstacle to the continued exploitation of a person's identity. For example, when Brandon Lee died during the making of *The Crow*, the filmmakers needed to place Lee in scenes that had never been

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that the right of publicity was not descendible under state law because that argument would have run directly counter to the fact that the estate had benefited by that right by entering into the contract to have books written under the Andrews name.

The *Andrews* case focused on the calculation for determining the fair market value of an author's name.[76] The Internal Revenue Service argued that based on the value of potential novels that could be written under the Andrews name and subtracting expenses and discounting for the contingent nature of the work, the Andrews name should be valued at $1,400,000.[77] The estate argued that due to the risky nature of ghost writing, the name should be valued at $140,000.[78] The court, in an apparent attempt to find a happy medium, determined that the value of the name for tax purposes was $703,500.[79]

C. *Beyond* Andrews

Andrews involved a straightforward question of valuation in a situation where the estate was exploiting the value of the decedent's name. The interesting question raised by the *Andrews* decision, however, is its applicability to the estate that does not want to exploit a name or likeness. As outlined above, under the basic estate tax rules, it is irrelevant whether there is any plan to

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filmed. They asked Dream Quest, the Simi Valley digital-technology company, whether it could be done. Dream Quest's response? "We said sure we could do that—if they had the money." *See* Marcy Magiera, *How Dream Quest Kept 'The Crow' Aloft*, Video Business, Aug. 12, 1994, at 52. This was hardly the first time filmmakers have faced such a problem. Bela Lugosi's dentist filled in for him after Lugosi died during filming of *Plan 9 from Outer Space* and a big floppy hat tried to cover for Jean Harlow's *Saratoga* stand-in. But Dream Quest's technology made the changes barely detectable. *Id.* Other examples of artists having active post-mortem careers can be seen in commercials where Fred Astaire dances with a vacuum cleaner and Lucille Ball buys diamonds from ServiceMaster. *See also* Joseph J. Beard, *Casting Call at Forest Lawn: The Digital Resurrection of Deceased Entertainers—a 21st Century Challenge for Intellectual Property Law*, 8:1 High Tech. L.J. 101 (1993); Erin Giacoppo, Note, *Avoiding the Tragedy of Frankenstein: The Application of the Right of Publicity to the Use of Digitally Reproduced Actors in Film*, 48 Hastings L.J. 601 (1997).

[76] *See Estate of Andrews*, 850 F. Supp. at 1288-96.

[77] *See id.* at 1286-88.

[78] *See id.* at 1288.

[79] *See id.* at 1295.

realize the market value of the asset. Indeed, it is even irrelevant whether any actual market exists, since the hypothetical buyer and seller standard will set a price for an asset.[80]

These rules can pose difficulties for the heirs whenever the estate consists of property that the heirs do not want to sell. For example, if the decedent owned a family vacation home, the estate must pay a tax on the market value of the house even if the heirs have no plans to sell it. If the estate does not have other assets with which to pay the tax, the executor may be forced to sell the home to generate the necessary revenue to pay the tax. This "forced sale" problem is generally accepted as one of the costs of an estate tax.[81] However, little attention has been paid to the problem of the forced sale as applied to the right of publicity, which has particularly unsettling implications.

Imagine that there are two sisters6both of whom are famous and popular writers of serial books (similar to Nancy Drew or the Hardy Boys). The sisters are similar in many respects: both have recognized a large degree of commercial success and both have names which are broadly associated with their works. Despite their many similarities, however, there is one significant difference: Sister A happily exploits the use of her name to achieve the greatest market return while Sister B is very private and therefore very particular about how her name is used. As a result of this difference A has generated wealth marketing her name through product endorsements and spin-offs of her series, whereas B has generated wealth only through publications of her book. The income tax system has recognized and respected these different choices by taxing A on the large amount of income earned by her and by taxing B on the relatively smaller amount of income earned by her.

Next assume that sisters A and B both die at the height of their careers and that under the law of their state of residence, the sisters' names and likenesses are descendible to their heirs at law. Each of their publishers wants to continue the author's series.

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[80] *See supra* notes 30-36 and accompanying text.

[81] Two notable exceptions to this "forced sale" have been legislated for family businesses and real estate used in farms or businesses. Congress has enacted specific statutory relief for these assets. *See* I.R.C. §§ 2032A and 2033A.

Therefore, they each offer to find someone to ghostwrite books in the series. To ensure that the books are accepted in the marketplace, the publishers propose to sell the books under the original author's name. In exchange for the right to use the author's names, the publishers offer to pay each of the estates $1,000,000.[82]

Sister A's family follows A's lifetime habits and sells to the publishers the right to use A's name. Sister B's family, respecting B's lifetime desires, rejects the publisher's proposal. The concern of B's family is that it would be demeaning to the memory of B to allow the marketing of her name this way.

How does the estate tax system reflect this difference? It doesn't. Under the estate tax system, both A's and B's estates are required to include the value of the author's name at its highest market value.[83] Assuming that the market will pay (as the publishers offered) $1,000,000 for the name, this will result in a tax liability to each of the estates of between $150,000 and $550,000. For the heirs of A this merely means that they will need to pay estate taxes on $1,000,000 paid to them by the publishers.[84] The heirs of B, however, are in a significantly different situation. Whereas both estates have the obligation to pay the tax liability, the heirs of A have the cash to do so. Having chosen to market A's name, they have realized the market value. In contrast, the heirs of B will need to find money from other sources to pay this tax. If they do not have the money they may be forced to sell the name in order to pay the tax.

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[82] Considering that in *Andrews* the court determined that $700,000 was an appropriate value for an individual author's name, $1,000,000 seems very reasonable. 850 F. Supp. at 1297.

[83] In this case there is evidence of an actual offer, but it is not necessary to show that there is an actual market offer in order to trigger this problem. Since the estate tax assumes a hypothetical market with hypothetical willing sellers and buyers anything with value will be deemed to have a market. *See supra* notes 30-36 and accompanying text.

[84] They will not be obligated to pay income taxes on this amount since they will have received the property interest in the name with a stepped up basis. I.R.C. § 1014.

D. Traditional Responses to Problematic Assets

One saving grace of the estate tax from the taxpayers' point of view is how easy it is to avoid.[85] Indeed, the estate tax has been referred to by some critics as a "voluntary tax" since it is frequently possible to substantially reduce an individual's estate tax liability through tax planning.[86] It is this voluntary nature of the estate tax that has facilitated avoidance of the tension caused by the estate tax acting as a property tax. Indeed, when there is an asset a taxpayer wants to retain without worrying about estate taxes, a bevy of traditional planning opportunities are available. For example, a vacation home can be transferred to a trust for the benefit of family members when its value is low,[87] the value of a business can be reduced for wealth tax purposes by imposing restrictions on its transferability,[88] and undeveloped land can be preserved by granting conservation easements.[89]

However, when these various techniques are applied to the right of publicity, they do not have the desired effect. The reason for this is that the tax system does not generally recognize the value of opting out of the market. Thus, even assuming that Sister B had the foresight and sophistication in estate taxes to recognize the potential problem raised by having a valuable name, she would likely be disappointed by the available planning opportunities.

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[85] Indeed this ease of avoidance is another aspect of the problematic nature of estate taxes. *See* George A. Cooper, *A Voluntary Tax? New Perspectives on Sophisticated Tax Avoidance* (1979).

[86] *See* Christopher Drew and David Cay Johnston, *For Wealthy Americans, Death is More Certain than Taxes*, N.Y. Times, Dec. 22, 1996, at A1.

> A decade after Congress closed some of the biggest loopholes in the tax on wealth handed down from one generation to the next, the Federal estate tax has become so easy to avoid that some experts believe that much of it is voluntary, at least for those who start planning early.
>
> "I think the estate tax is voluntary in two senses—how much you eventually need to pay within a family and when you pay it," said William D. Zabel, a New York estate lawyer and the author of "The Rich Die Richer and You Can Too." "I wouldn't say all of it, but you can eliminate much of it."

Id.

[87] *See, e.g.*, Kathryn G. Henkel, *Estate Planning and Wealth Preservation,* ¶ 8.01-8.10, at 8.2-8.25 (1997).

[88] *Id.* ¶ 25.02-25.07, at 25-2.

[89] *Id.* ¶ 36.05, at 36-6.

In response to the *Andrews* decision, commentators have suggested planning opportunities to address problems raised by the right of publicity.[90] In line with traditional estate planning techniques, a variety of methods were suggested for dealing with the right of publicity: (1) have clients make gifts of the right early in their careers to trusts for their children or grandchildren when the value of the right is negligible;[91] (2) place restrictions in a will (or other testamentary instrument) on the right of publicity, thereby reducing or even eliminating the value of the right subject to tax;[92] or (3) assign the right of publicity to a charity or a private foundation. Although these traditional planning methods work with many common property interests, when applied to the right of publicity, each solution is highly problematic.

1. *Gifting the Right of Publicity*

Estate taxes are part of a unified estate and gift tax system under which all gratuitous transfers are theoretically treated the same, whether made during life or at death. Nonetheless, transferring property by gift has several distinct advantages over transferring property at death and is widely considered to be one of the most effective tools available in the estate planning arsenal.[93] The reason for this is two-fold: first, since property tends to appreciate in value over time, transferring property during life enables the donor to take all post-transfer appreciation out of her estate for tax purposes; and second, the transfer tax system allows for an individual to transfer $10,000 by gift each year free of tax to an unlimited number of individuals ($20,000 if the donor is married

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[90] *See* Paul L. Caron, *Estate Planning Implications of the Right to Publicity*, 68 Tax Notes (TA) 95 (July 3, 1995); and Note, *Federal Estate Tax and the Right of Publicity: Taxing Estates for Celebrity Value*, 108 Harv. L. Rev. 683 (1995) [hereinafter, *Right of Publicity*].

[91] Caron, *supra* note 90, at 97.

[92] *Id.*; *Right of Publicity*, *supra* note 90, at 692.

[93] One of the few advantages of transferring property at death rather than during life is that the recipient of property transferred at death receives that property with a basis equal to the property's fair market value at the time of the decedent's death (*i.e.*, a stepped-up basis); whereas, the recipient of a gift receives that property with the same basis that the donor had in the property. I.R.C. §§ 1014-15.

and her spouse joins in making the gift).[94] Thus, if a married donor has three children, each year she can transfer $60,000 to them tax free.

If Sister B had had the foresight to see an estate planner who was aware of the right of publicity and its tax implications, she could have been advised to transfer the use of her name to a trust for the benefit of her family early in her career when it was of little or no value. This transfer could occur in one year or over many years, depending upon the value of the right and the number of people who Sister B wanted to benefit. In addition, to ensure that B's wishes were fulfilled, the transfer could include a restriction that B's name could not be used for commercial purposes (this would have the added benefit of reducing the value of the right for gift tax purposes).

This plan would avoid the tax problem raised by the right of publicity since at the time of B's death, she would not own any interest in that right. However, like many tax solutions, this "solution" raises its own host of real life non-tax problems. Specifically, in order for this plan to work, Sister B would need to relinquish all control over the commercial use of her name during her life. If she wanted to use her name for her own books or to endorse a cause she believed in, she would need to get permission from the trustee of the trust. If she retained the right to revoke the transfer or to use her name during her life then the tax problem would not be solved since the full date-of-death value of the right of publicity would be subject to estate tax at the time of her death by virtue of these retained rights.[95] A similar result would occur if she were to make herself trustee of the trust.[96] Thus, although Sister B could technically avoid the tax problems associated with having a valuable name by gifting the asset during her life, to do so would be at the cost of losing lifetime control of the use of her own name.

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[94] I.R.C. § 2503(b).

[95] Revocable transfers are subject to tax at their date-of-death value under I.R.C § 2038, and transfers with retained life estates are subject to tax under I.R.C. § 2036.

[96] *Id.*

2. *Placing Testamentary Restrictions on Use of the Right of Publicity*

The most obvious response to the problem raised by the individual with a valuable name who does not want her name exploited after death is for that person to impose this restriction in a testamentary instrument. This could be done in one of two ways: (1) she could provide in her will the direction that she does not want her name used for any commercial purpose,[97] or (2) she could transfer her name to a trust with the direction to the trustee that the name is not to be exploited for commercial purposes. These solutions would appear to provide an easy solution to unwanted post-mortem exploitation of a person's right to publicity. However, it is unlikely that either solution would prove viable under either substantive trusts and estates law or under tax law.

In order for the restriction to work from a substantive law perspective, the restriction would need to be enforceable. This is problematic since courts are generally averse to "dead hand control," particularly when it involves the destruction of value.[98] Thus, although there have been no cases directly addressing restrictions on the right of publicity, case law in related areas suggests that it may be difficult to ensure that these restrictions will be upheld. For example, although numerous authors have directed that their letters be destroyed upon their death, this restriction is rarely enforced.[99]

Transferring the right of publicity to a trust with the restriction in the trust instrument against commercial exploitation of the

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[97] This provision would be similar to that provided by many well-known people of letters who have provided in their wills that their personal papers should be destroyed upon their death. *See* Mary Sarah Bilder, *The Shrinking Back: The Law of Biography*, 43 Stan. L. Rev. 299, 329 (1991).

[98] Lewis M. Simes, *Public Policy and the Dead Hand* (1955); Susan F. French, *Perpetuities: Three Essays in Honor of My Father*, 65 Wash. L. Rev. 323, 348-53 (1990); Jesse Dukeminier, *A Modern Guide to Perpetuities*, 74 Cal. L. Rev. 1867 (1986).

[99] *See* Bilder, *supra* note 97. H.L. Mencken bequeathed his diary to the Enoch Pratt Free Library on the understanding that it was not to be put at the disposal of readers until twenty-five years after his death, at which point it was to be made available only to "students engaged in critical or historical investigation, approved after proper inquiry by the chief librarian." The Maryland Attorney General nonetheless found that the library could publish an edited version because the memorandum was not legally enforceable. *Id.* at 330, n.173, *discussing* 70 Op. Md. Att'y Gen. 213, 214 (1985).

name provides its own difficulties. The reason for this is that trust property must be held for the benefit of the trust's beneficiaries. Therefore, restrictions may be avoided if to do so would increase the value of the trust assets for the beneficiaries. Thus, when Joseph Pulitzer sought to ensure publication of the *New York World* newspaper by bequeathing the stock to a trust for the benefit of his descendants with the express restriction that the sale of the stock was not authorized under any circumstances, the court nonetheless authorized the sale of the stock in order to maximize assets for the beneficiaries of the trust.[100] These cases lend serious doubt as to the enforceability of a restriction limiting the commercial use of the right of publicity.

Moreover, even if these restrictions were found to be enforceable as a matter of substantive law, it is unlikely that the imposition of the restriction would produce the desired result from a tax perspective. In order for the tax goal to be accomplished, valuation of the interest in the right of publicity must take into account the terms of the testamentary instrument (in this case the restriction on the commercial exploitation of the name). This result appears to be supported by the Ninth Circuit decision in the case of *Ahmanson Foundation v. United States*.[101] In that case the court, in dicta, stated:

> The valuation should... take into account transformations brought about by those aspects of the estate plan which go into affect logically prior to the distribution of the property in the gross estate to the beneficiaries. Thus, for example, if a public figure ordered his executor to shred and burn his papers, and then to turn the ashes over to a newspaper, the value to be

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[100] *In re Pulitzer's Estate*, 249 N.Y.S. 87 (Sur. Ct. 1931).

[101] 674 F.2d 761 (9th Cir. 1981). The *Ahmanson* case involved a decedent who owned a controlling interest in the stock of a corporation through a revocable trust which provided that upon his death, the trust should transfer the stock to a holding company that the trust wholly owned, and then immediately transfer the nonvoting stock of the holding company to a charitable foundation. The court in that case ruled that for purposes of determining the value of the estate for estate tax purposes as well as for purposes of the charitable deduction, the court should take into account "transformations brought about by those aspects of the estate plan which go into effect logically prior to the distribution of [the] property... to the beneficiaries." *Id.* at 768. *See* Bogdanski, *supra* note 31, ¶ 2.01[3][c]. The *Ahmanson* case is also discussed in *Right of Publicity*, *supra* note 97.

> counted would be the value of the ashes, rather than the papers.[102]

In a student note discussing the *Andrews* case,[103] it was suggested that the decision in *Ahmanson* could provide support for an individual who wants to avoid post-mortem exploitation of a right of publicity. However, it is unlikely that *Ahmanson* would ever be interpreted this broadly. Such a broad interpretation would potentially provide an enormous loophole to the estate tax system. For example, if *Ahmanson* was followed such that the terms of an estate plan were considered in determining the value of the estate for estate tax purposes, then an individual could substantially reduce or even eliminate her estate tax liability by imposing restrictions on the post-mortem use of property. This could limit the property's value for purposes of determining the market value under the highest and best use standard, without limiting the recipient's enjoyment of the property. For example, an individual with a valuable vacation house could provide in a testamentary instrument that the house could only be used by the owner's family members. If this restriction were to be taken into account for valuation purposes, it would significantly reduce the property's market value since no one would want to purchase property that she couldn't use.

In order to avoid such loopholes, the estate tax system does not as a rule take into account terms of an estate plan in valuing property. Instead, the estate tax is imposed on all property that could be transferred and not on the value of that which is actually transferred. Thus, when an individual transfers 100% ownership of a corporation in his will to four different recipients (giving each of them a 25% share), the estate is subject to tax on the value of the corporation as a whole, including the control premium, even though the control premium is effectively destroyed through the division of the property.[104] Applying these principles to the right of publicity,

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[102] *See Ahmanson*, 674 F.2d at 768.

[103] *See Right of Publicity*, *supra* note 90.

[104] *See Right of Publicity*, *supra* note 90. For an excellent discussion of the issues raised by minority discounts see James R. Repetti, *Minority Discounts: The Alchemy in Estate and Gift*

(continued...)

it appears likely that, notwithstanding the language in *Ahmanson*, the full fair market value of the right of publicity would still be subject to tax under existing law, even if the decedent attempted to destroy its value through restrictions on use in her estate plan.

3. *Transferring the Right of Publicity to a Charity or Private Foundation*

Another possible planning tool for avoiding the tax problem raised by the right of publicity is to transfer the right to a charity with the express provision that the right is not to be exercised for commercial purposes. The purpose of this would be to mimic the conservation easement whereby development rights in land are transferred to a charitable entity that agrees not to develop the interest.[105] Applied to the right of publicity, the donor would transfer the development potential of his name to a charity or private foundation on the condition that it not be developed. Although this plan may achieve the desired result in terms of

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Taxation, 50 Tax L. Rev. 415 (1995).

[105] "A conservation easement is an instrument under which a real estate owner — either by donation, sale, or exchange — gives up rights to develop land or change the appearance of a building, thus preserving it for some conservation purpose." George M. Covington, *Conservation Easements: A Win / Win for Preservationists and Real Estate Owners*, 84 Ill. B.J. 628, 628 (1996). It allows the easement owner to prevent the servient estate owner from building on the servient estate except as specified in the grant. *See* Jesse Dukeminier & James E. Krier, *Property* 854 (3d ed. 1993); John L. Hollingshead, *Conservation Easements: A Flexible Tool for Land Preservation*, 3 Envtl. L. 319, 326 (1997). A conservation easement is perpetual in duration and is transferable. *See* Dukeminier & Krier, *supra*.

In recognition of the environmental benefits of conservation easements, the federal government has created incentives for their use through the tax laws. *See* I.R.C. § 170(f)(3)(B), (h); Dukeminier & Krier, *supra*; Hollingshead, *supra* at 338-39. First, if the donation of a conservation easement satisfies the requirements of section 170 of the Internal Revenue Code, it qualifies as a tax-deductible charitable gift. *See* I.R.C. § 170; Vivian Quinn, *Preserving Farmland with Conservation Easements: Public Benefit or Burden?*, 1992/1993 Ann. Surv. Am. L. 235, 247. "[T]he donor may deduct the lesser of the value of the easement or 30% of her adjusted gross income each year for a total of six years until the value of the gift is depleted. Thus, if the donor has an adjusted gross income of $45,000, and she has a qualified easement donation valued at $90,000, she may deduct up to $13,500 (30% of $45,000) from her taxable income for each of the next six years." Quinn, *supra*. In addition, estate tax benefits are also available. If the donation is made at death, the donor-decedent is entitled to a charitable deduction. *See* Covington, *supra*, at 631. "If the easement is donated prior to death, the donation has simply reduced the value of the real estate remaining in the estate and thus reduced the amount of estate taxes payable." *Id.*

limiting use of the name, it is unlikely that it would achieve the tax goal of avoiding taxation of the right of publicity.

The estate tax provides for an unlimited charitable deduction equal to the value of the interest transferred.[106] Thus, when an interest is transferred to a charitable organization, the estate receives a deduction which can offset the inclusion of the asset in the gross estate. For example, if a decedent owned a painting worth $1,000,000 and donates that painting to a museum in his will, the full value of the painting would be included in the decedent's gross estate,[107] and the estate would be entitled to an offsetting deduction equal to the value of the painting for the donation to the museum.[108] However, in order for the estate to receive the full offsetting deduction, the full value of the asset must be transferred (in this case, the right of publicity without any restrictions or limitations). If restrictions are imposed, then the deduction is limited to the fair market value of the restricted interest.[109] Thus, when an individual donated land to an agricultural college subject to the restriction that the land be used solely for agricultural purposes, the charitable deduction was limited to the fair market value of the land determined in light of the restriction.[110] Similarly, if the decedent transfers a right of publicity to a charitable organization subject to the restriction that the right may not be exercised for commercial purposes, then the value of that right of publicity (and the attending tax deduction) would be very low.[111]

Why does this same problem not apply in the conservation easement situation? The reason is that in the area of land, we

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[106] I.R.C. § 2055.

[107] I.R.C. § 2033.

[108] Assuming the museum met the requirements of a charitable organization for purposes of I.R.C. § 2055.

[109] The deduction is measured by the property's fair market value which is defined as the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts. Reg. § 1.170A-1(c)(2) (1996).

[110] Rev. Rul. 85-99, 1985-2 C.B. 83.

[111] It is also possible that the charitable deduction would be disallowed altogether under I.R.C. § 170(f)(3) which provides (subject to certain exceptions) for a denial of the charitable deduction if a taxpayer contributes less than his entire interest in his property. One of the enumerated exceptions is for qualified conservation easements.

recognize that the non-development of land can serve a public benefit.[112] The value of preserving a person's dignity after death is seen as conferring an essentially private benefit and is therefore not recognized by the estate tax system.

IV. A CASE IN CONTRASTS: THE INCOME TAX TREATMENT OF HUMAN CAPITAL

The income tax system has recognized the problems associated with taxing highly personal interests under a highest potential value taxation system in its refusal to tax human capital.[113]

Human capital can be understood as the ability of an individual to earn money on the market. One scholar has described it in the following way:

> Human capital, in economic terms, is equivalent to the present value of the flow of future satisfactions that an individual can command in the course of his life. Some portion of this capital consists of endowment, the biological and social inheritance that accompanies a person into the world. The remainder is acquired through individual action, such as education, on-the-job training, migration, and health care, or stems from exogenous changes such as technological or social transformation.[114]

The failure to tax human capital reflects a deviation from the ideal income tax base. The most widely accepted definition of the ideal income tax base is the Haig-Simons definition of income.

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[112] For examples of preservation that are considered to yield a public benefit see Reg. §1.170A-14(d)(4)(iv)(B).

[113] This is effected through the realization requirement which provides generally that the accession to wealth be sufficiently fixed and definite to be treated as gross income. *Eisner v. Macomber*, 252 U.S. 189, 212 (1920). Although at one time realization was believed to be a constitutional requirement under *Eisner*, the Supreme Court appears to have abandoned this as a requirement in its later rulings. James E. Maule, *Gross Income*, 501 Tax Mgmt. Portfolios (BNA), at A-10 (1992). "Since the advent of the New Deal Court in the late 1930's, however, it has seemed reasonably certain that the Court no longer views realization as a constitutional requirement." Paul B. Stephan III, *Federal Income Taxation and Human Capital*, 70 Va. L. Rev. 1357, 1360 n.3 (1984). It now appears that realization is an administrative concern rather than an essential element of income. *Id.*

[114] Stephan, *supra* note 113, at 1358-59. Stephan notes that for income tax purposes the study of human capital focuses on net changes in the value of human capital over an accounting period rather than the value of capital possessed at any one time. *Id.* at 1359.

Under that definition, an individual's income is the sum of his consumption plus accumulation during the taxable period.[115] Increases in human capital would constitute accumulation under the Haig-Simons standard. Thus, when an individual graduates law school, that person arguably has an increase in human capital that would be subject to tax under an ideal income tax:

> The increase in human capital produced by his schooling and measured by future earnings constitutes income during the period of acquisition, just as if the student owns securities that grow by a similar amount over the same period. Under a comprehensive tax on economic income, increases in future earning power of the sort experienced by the law student should produce liability and decreases should produce deductions, even though the investor will also pay tax on earnings when received.[116]

It should be noted that this tax on the law student's human capital is independent of any income that he may subsequently earn as a lawyer. Indeed, if the student decided that he did not want to pursue the practice of law, and instead perhaps decided that he wanted to be a beachcomber, or even if the student wanted to take a low paying public interest job, he would nonetheless be subject to tax on his highest earning potential if human capital was included in the income tax base. One possible result of this is that under this system the student may be forced to practice law in order to pay the taxes associated with the increase in earning capacity.[117]

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[115] Personal income may be defined as the algebraic sum of (1) the market value of rights exercised in consumption and (2) the change in the value of the store of property rights between the beginning and end of the period in question. *See* H. Simons, *Personal Income Taxation: The Definition of Income as a Problem of Fiscal Policy* 50 (1938).

[116] Stephan, *supra* note 113, at 1359-60.

[117] However, this is less likely in the income tax area (as opposed to the wealth tax) since a tax on human capital would be based only on the net changes in the value of the human capital and not on the full value of the capital possessed at any one time. Indeed, proponents of the taxation of human capital argue that for most taxpayers the tax result generally would be more favorable than under the current system since the tax would be imposed at a time when the taxpayer is in a low tax bracket. "Because this income will often arise when the individual is not otherwise employed and thus is in a low tax bracket, and because deductions

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Although the concept of taxing human capital conforms with this theoretical ideal income tax system, many objections have been raised to doing so, most notably by Professors Kelman and Warren.[118] Both Kelman and Warren provide convincing justifications for excluding human capital from the tax base.

Professor Kelman acknowledges that taxing people on their earning capacity rather than on their actual earnings may provide a more accurate reflection of the sacrifices a particular taxpayer is making when asked to give a certain sum of money to the state.[119] However, Kelman argues that, nonetheless, it is morally wrong to have a tax system that forces people into the market:

> The tax system ought not to force people into the market. To force the beachcomber to work as a doctor, to force people to work a 5 day week when they only want to work 3 days a week or to force people to work in a location they dislike in order to earn the prevailing market wage so they can pay taxes6all this would violate the simple libertarian principle that the state should not require people, directly or indirectly, to engage in particular activities. But once a taxpayer has decided to enter the market the tax system can certainly disregard how he chooses to spend his money.[120]

The justification for Kelman's position stems from a political recognition of a basic human resistance to commoditization.[121] As Kelman notes, the resistance to commoditization is supported by a wide spectrum of political viewpoints. For example, Karl Marx in

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can be taken when the individual is established in a profession and thus is in a higher bracket, the net effect of taxing human capacity might be a benefit to a significant number of taxpayers, assuming the taxpayers can overcome any problem of cash flow." David J. Shakow, *Taxation Without Realization: A Proposal for Accrual Taxation*, 134 U. Pa. L. Rev. 1111, 1160 (1986).

118 Mark G. Kelman, *Personal Deductions Revisited: Why They Fit Poorly in an "Ideal" Income Tax and Why They Fit Worse in a Far from Ideal World*, 31 Stan. L. Rev. 831 (1979); Alvin Warren, *Would a Consumption Tax Be Fairer Than an Income Tax?*, 89 Yale L.J. 1081, 1115 (1980) (arguing that the Haig-Simons definition of income fails to account for human capital).

119 Kelman, *supra* note 118, at 841.

120 *Id.* at 842.

121 *Id.*

his classic work stated that treating labor as commodity dehumanizes workers.[122] From another front, the libertarian-contractarian view would also support this on the basis that the decision not to tax non-market transactions allows the citizen of civil society to choose to still live in a state of nature.[123] Kelman himself believes that the tax system should respect a taxpayer's refusal to treat potentially marketable resources as commodities since this represents a desirable anticapitalist strain in a market-obsessed culture.[124]

Professor Warren adds his own objections to the taxation of human capital. According to Warren, the taxation of human capital should be rejected on the basis that it is inconsistent with widely accepted concepts of individual liberty because it would disregard personal choices such as which career to pursue, the amount of time to devote to work as opposed to leisure, and so on.[125] Warren's position stems from the Kantian notion that there is a distinction between persons and things,[126] and that the refusal to tax human capital is a recognition of that distinction.[127]

Many of the moral concerns raised about imposing an income tax on human capital are equally applicable to imposing a wealth tax on the right of publicity. Namely, to the extent that the imposition of the tax could result in the forced commodification of the person's name or likeness, it is morally wrong because it is dehumanizing in the Marxian sense and constitutes a violation of Kant's categorical imperative that we should not treat people as objects.

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[122] *Id.* at 843 n.38, *citing* K. Marx, *Economic and Philosophic Manuscripts, in* Early Writings 280 (1963).

[123] *Id.* at 842 n.33, *citing* R. Nozick, *Anarchy, State and Utopia* 10-22 (1974).

[124] *Id.* at 880.

[125] Warren, *supra* note 118, at 1114.

[126] Warren argues that this distinction is already recognized in many areas of the law (*e.g.*, in the prohibition against slavery, in statutes that prohibit long-term contracts for personal services and commerce in infants, as well as in the absence of specific performance for breaches of personal service contracts). *Id.* at 1115.

[127] "Although the matter can be disputed, people may be thought of as distinct from things, even when the things are the product of human endeavor. The individual's personhood may be said to extend to his productive capacity, but not to his product." *Id.*

V. REDEFINING WEALTH

The problems raised by the imposition of the estate tax on the right of publicity occur because the estate tax does not generally recognize the burdens imposed by the forced sale of certain property interests. This section more closely examines the nature and scope of these burdens.

A. *The Source of the Problem: The Myth of Fungibility*

The estate tax is founded on a myth of fungibility in that it imposes a tax on all assets owned at death without regard for the particular property interests that make up the estate. An individual who dies with a gross estate of $1,000,000 is treated the same regardless of whether her gross estate consists of cash, a business, vacation property, jewelry, stock or any other asset or combination of assets with a fair market value of $1,000,000.[128] This taxation is based on the notion that the market provides a perfect reflection of value. Under this world view $1,000,000 in cash is treated the same as a house worth $1,000,000 because the market reflects functional equivalence. The hypothetical willing buyer and willing seller standard posits a world view in which people's relationship to property is de-personalized. A decedent's relationship to her name is treated the same as her relationship to her stock portfolio.

Although the estate tax system treats all property as fungible, people do not think of or treat all of their property as fungible. People are not equally willing sellers with respect to all that they own. Thus, for example, there are some things that a person may be willing to sell, but not at the price generally available on the market and there are other things that a person may not be willing to sell at any price.

When a person is willing to sell a property interest, but not at the price offered on the market, this usually reflects a sentimental attachment towards the property. For example, if a person receives a pocketwatch from his father with a market value of $50, he would

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[128] Subject to the exceptions for family farms and businesses. I.R.C. §§ 2032A and 2033A. The exception for family farms is discussed *infra* notes 157-63.

probably be unwilling to sell it for that amount since the market price would not compensate him for the loss of the sentimental value. Of course, this determination is not absolute. If someone were to offer him $500 for the $50 watch, he might change his mind. This relationship between people and their property is sometimes described cynically by the adage "every man has his price."

When a person is unwilling to sell a property interest at any price, this reflects a determination on her part that the value of the item in question cannot be measured in money terms.[129] Thus, the reason that most people are unwilling to sell their children is not because the market price is insufficient, but rather because of a belief that the value of their children cannot be measured in dollar terms.[130] Society as a whole has found some of these individual valuations so fundamental as to make the sale of certain assets illegal. For example, society prohibits the sale of human organs and children.[131] However, there are other property interests that may be salable by law, but which an individual may be unwilling to sell because to do so would conflict with other values.[132] These value judgments are intimately connected with people's sense of their own identities. Thus, for example, when Jackie Onassis died, she was willing to allow the sale of many items, but she specifically

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[129] The notion that certain values are beyond money is inherent in one of the meanings of the term "sell" which is "to dispose of or manage for a profit instead of in accordance with conscience, justice or duty." Webster's Ninth New Collegiate Dictionary 1068 (1989).

[130] In arguing against the enforcement of surrogacy contracts as being essentially the same as the sale of children, Professor Sandel argues that "[t]reating children as commodities degrades them by using them as instruments of profit rather than as cherishing them as persons worthy of love and care." Michael J. Sandel, *The Baby Bazaar*, The New Republic, Oct. 20, 1997, at 25.

[131] Margaret J. Radin, *Contested Commodities: The Trouble with Trade in Children, Body Parts and Other Things* 21 (1996) [hereinafter *Contested Commodities*]. This approach applies to the sale of some services as well. For example, most states prohibit the sale of sexual services.

[132] The fact that the value of an individual's reputation cannot be reflected in money terms was noted by Shakespeare almost four-hundred years ago when he wrote:

> Who steals my purse steals trash; 'tis something, nothing;
> 'Twas mine, 'tis his, and has been slave to thousands;
> But he that filches from me my good name
> Robs me of that which not enriches him,
> And makes me poor indeed.

William Shakespeare, *Othello*, act 3, sc. 3.

requested that her personal letters not be made public.[133] Presumably this was not because she was afraid that the market price would be insufficient, but rather reflected her value judgment that her privacy was not for sale. Society purports to respect the decision to put other values over monetary values. Thus, people speak favorably of a person who "refuses to sell out" and describe unfavorably a person who strives to maximize recognition of his market value without regard to other values as "prostituting himself." This relationship between people and their property is described by the adage "not at any price."[134]

What accounts for this varying relationship between people and property such that some property is valued only for its ability to be sold or traded for other goods, while other property seems to have additional intrinsic value to its owner? This issue has been discussed by property theorists who have noted that the determining factor is the extent to which the property interest is tied up with the person's identity.[135] Some property interests are so intimately connected with ourselves that they become part of our very being.[136] Being deprived of such a resource transcends the

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[133] The will states: "I give and bequeath all copyright interests owned by me at the time of my death in my personal papers, letters or other writings by me, including any royalty or other rights with respect thereto, to my children who survive me, in equal shares. I request, but do not direct, my children to respect my wish for privacy with respect to such papers, letters and writings and, consistent with that wish, to take whatever action is warranted to prevent the display, publication or distribution, in whole or in part, of those papers, letters and writings." <http://www.courttv.com/legaldocs/newsmakers/wills/onassis.html>.

[134] When it involves their own labor, people tend to be particularly choosy about their willingness to sell. Thus, there is some work that people will not do because it doesn't pay enough and there is other work that people will not do for any price. Some of the work a given individual may refuse to do may be illegal, like prostitution or killing for hire, but other such work may simply be contrary to a given person's values. For example, some lawyers may refuse to represent certain clients (*e.g.*, organized crime figures or the tobacco industry); more generally, some people are unwilling to sell their services in a given line of work (*e.g.*, being a lawyer). By refusing to grant specific performance for personal service contracts, our legal system respects an individual's ability to make choices about how she uses and sells her labor. *See* Dan B. Dobbs, *Law of Remedies, Damages, Equity, Restitution*, § 12.8(3) (2d ed. 1993). Arguably, the individual's judgment regarding the use of her labor is also respected by means of the income tax system's refusal to tax human capital. *See supra* notes 114-127 and accompanying text.

[135] *See, e.g.*, Margaret Jane Radin, *Property and Personhood*, 34 Stan. L. Rev. 957, 959 (1982) [hereinafter *Property and Personhood*].

[136] Hanoch Dagan, *Unjust Enrichment: A Study of Private Law and Public Values* 41 (1997)

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financial set-back involved; it is experienced as a violation and lessening of self.[137] This relationship between people and things exists on a continuum that ranges from a thing indispensable to someone's being ("constitutive property") to a thing wholly interchangeable with money ("fungible property"), with many relationships falling somewhere in the middle.[138]

Our legal system has implicitly recognized this distinction between constitutive and fungible property in the way that it grants greater societal deference to certain highly personal property interests. For example, the legal system's recognition of the sanctity of the home is due to the fact that the home is inextricably part of the individual who lives there.[139] Similarly, the bankruptcy exceptions for personal property can be understood as reflecting a greater deference to property that is tied up with an individual's sense of identity.[140] In addition the societal decision to prohibit the sale of certain types of property can also be understood as recognition of the importance of constitutive property. Thus, in prohibiting the sale of children and, human organs, society is prohibiting the sale of those things that are most personal in nature.[141]

The work in the area of constitutive property has primarily focused on the relationship between living people and their property. However, this theory is ripe for application to post-mortem property interests, because although the person is gone, her rights as a person are not. We recognize post-mortem property rights of individuals in a number of ways. For example, a person's property interests do not cease at death to the extent that they are

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(summarizing commentators in the area).

[137] *Id.*

[138] Radin, *Property and Personhood, supra* note 135, at 957, 987.

[139] *Id.* at 1013.

[140] Section 522(d) of the Bankruptcy Code exempts from creditor claims a debtor's interest in household furnishings, household goods, wearing apparel, appliances, books, animals, crops or musical instruments that are held primarily for the personal, family or household use of the debtor. *See id.* at 1014, n. 202(4).

[141] *See* Margaret J. Radin, *Contested Commodities, supra* note 131.

entitled to write a will to dispose of their property as they wish.[142] Indeed, the Supreme Court has ruled that the right to transmit property at death, either by will or through intestacy, is a constitutionally protected interest which cannot be taken without just compensation.[143] Other ways in which people's property rights survive death include the enforceability of most legal claims after death[144] and the continued protection of the use of a person's name or likeness after death (in those states that recognize a descendible right of publicity).[145] These post-mortem property rights are generally exercised through the decedent's personal representative.[146] In addition to the interests which we traditionally think of as property, a person's interest in his own body is also recognized after death. Thus, a body cannot be used for medical research and organs cannot be taken for transplant without the consent of the decedent or of a representative of the decedent's wishes.[147]

What is the effect of death on the characterization of a property interest on the continuum from fungible to constitutive? For many property interests, death will have the effect of diminishing the constitutive nature of the property. Thus, for example, the home may be constitutive property while a person is living because: "it is the scene of one's history and future, one's life and growth. In other words, one embodies or constitutes oneself there."[148] However, once that person has died the home loses that aspect (although not all

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[142] If the owner of property does not write a will, the property will pass according to the laws of intestacy. The goal of the intestacy laws is to approximate the disposition of property which most people would choose; generally, the presumption is that the property should pass to the decedent's heirs. *See* Unif. Probate Code, Part I: Intestate Succession, 8 U.L.A. 79 (amended 1990).

[143] *Hodel v. Irving*, 481 U.S. 704, 713-17 (1987); *see also* Case Comment, *Escheat of Indian Land as a Fifth Amendment Taking in Hodel v. Irving: A New Approach to Inheritance?*, 43 U. Miami L. Rev. 739 (1989).

[144] *See* Stuart M. Speiser et al., *The American Law of Torts* § 5.20 (1983).

[145] *See supra* notes 57-63 and accompanying text.

[146] The decedent's representative is either the appointed executor (if there is a will) or the administrator (if the person died intestate).

[147] *See, e.g.,* Gloria J. Banks, *Legal & Ethical Safeguards: Protection of Society's Most Vulnerable Participants in a Commercialized Organ Transplantation System*, 21 Am. J.L. & Med. 45, 64-71 (1995).

[148] *See* Radin, *Property and Personhood, supra* note 135, at 992.

aspects) of personal identity since that person can no longer live there.[149]

Although some property interests lose their constitutive nature by virtue of the person's death, some property interests are so closely identified with the decedent's person that even death does not sever the connection. These property interests tend to be so closely identified with the person, that the average lay person would not think of them as property separate and apart from the person. A person's name or likeness is a paradigmatic example of this type of interest. Other examples of this type of personal property include a person's body and, to a lesser extent, their personal papers.

B. *The Scope of the Problem: Estate Tax Implications of the Myth of Fungibility*

As discussed above, many areas of substantive law have at least implicitly given deference to property that is personal in nature.[150] This section focuses on how the myth of fungibility affects constitutive property rights.

The estate tax system imposes market values on all property interests owned at the time of death. In so doing it imposes a neutral rule governing all property interests, whether fungible or constitutive in nature. However, as has been shown in other areas of the law, neutral rules can have widely disparate impacts when acting upon different objects. This section looks more closely at the implication of the current one-size-fits-all system for three types of property interests: fungible property, property with subjective sentimental value, and property the sale of which would conflict with other values.

Compare the following situations: (1) Taxpayer A dies; the only asset in her estate is cash and publicly traded stock with a market

[149] Ironically, although the effect of death is to make much of the decedent's personal property become more fungible, the effect of the decedent's death can also be to make that which was fungible property to the decedent become constitutive (or personal) property to the heirs. "Much of the property we unhesitatingly consider personal—for example, family albums, diaries, photographs, heirlooms, and the home—is connected with memory and the continuity of self through memory." *Id.* at 967.

[150] *See supra* notes 139-141 and accompanying text.

value of $1,000,000 and a subjective value to A and her heirs of $1,000,000; (2) Taxpayer B dies; the only asset in B's estate is an old family heirloom which has a subjective value to B and her heirs of $1,000,000 due to the sentimental attachment, but which has a market value of only $100,000; and (3) Taxpayer C dies; the only asset in C's estate is her name. Although a publisher would pay $1,000,000 to attach C's name to a book written by someone else, the heirs do not want to sell for any price because to do so would be contrary to C's wishes.

The estate tax operates as we would expect when it is applied to fungible property. The heirs of taxpayer A will owe between $153,000 and $550,000 in taxes and will likely be forced to sell at least a portion of the stock in order to pay the taxes. However, although A's estate will need to pay the tax liability, they will not suffer any additional burden by virtue of the forced sale since the market price received will provide adequate compensation for the loss of the property.

The estate tax benefits property which has a sentimental value to its owners by taxing the property based on its objective market value as opposed to the subjective value. The reason for this is that market value will not reflect the sentimental attachment.[151] Thus, the heirs will be able to keep $1,000,000 of subjective value, while only paying a tax based on the $100,000 market value. As long as this sentimental property has an objective market value of less than $625,000, no tax needs to be paid. For property that is worth more than $625,000 the heirs will need to either sell the property or pay their own money in order to keep it.[152] However, if its subjective value is truly greater than its objective market value, then the heirs should not mind paying the tax liability from their own funds in order to preserve this added value.

C and her heirs are uniquely harmed by the imposition of a tax on the market value. The goal of C and her heirs is to not treat the right of publicity as a marketable commodity, and they are presumably happily willing to forego the market return in order to preserve other values. However, the estate tax system does not accommodate this desire. Similar to the heirs of taxpayer A,

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[151] *See supra* notes 35-36 and accompanying text.

[152] *See supra* note 12.

taxpayer C's estate will owe between $143,750 and $550,000 in taxes.[153] They will either have to come up with the money from their own resources or else be forced to liquidate the asset in the estate in order to pay the tax liability. However, whereas the heirs of A are going to feel adequately compensated by the market price received from the sale of the stock, the heirs of taxpayer C will not be adequately compensated. The unapproved exploitation of C's name imposes a unique burden on the heirs of C that cannot be adequately compensated with money.

Although the right of publicity presents a classic example of property connected with an individual's identity as a person, it is not by any means the only such property interest. The problem raised by taxing the right of publicity occurs whenever a person chooses other values over market values and desires to avoid treating the property interest as a marketable commodity.

1. Celebrity Artifacts

Most personal property interests, by virtue of their personal nature, have very low market values. Thus, although the photo album that contains pictures of my children is of great value to me, its market value will be very low. One exception to this rule is for celebrity property. Thus, while my photo albums of my children will likely have a very low value, Jackie Onassis' personal photo album of Caroline and John-John romping on the White House lawn would probably have a very high market value. As recent sales at the auction houses have shown, celebrity artifacts have very high market values. When Princess Diana sold her dresses to raise money for charity, the sale raised over $3,260,000.[154] Given the overwhelming response to her death, one can only imagine the amount of money that could be generated by auctioning off her personal effects today. The heirs of some celebrities might choose this route with respect to some of the person's properties. However,

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[153] Assuming that no prior taxable gifts were made the tax bill on a $1,000,000 estate is $143,750. I.R.C. §§ 2001, 2010. This amount could be as high as $550,000 if the unified credit was used up through prior taxable gifts. I.R.C. § 2001(e).

[154] *Gown Auction Raises $3.26 Million*, Rocky Mountain News, June 27, 1997, at 58A. Seventy-nine gowns and dresses sold for an average of $41,250. *Id.* The highest price paid for a single gown was $222,500, a record for a costume at auction. *Id.*

to force the heirs of every celebrity to pay a tax based on the money that could be generated by doing so is perverse and a violation of personal dignity. This is particularly true in light of the fact that the market value would likely be highest for those individuals who most treasured their privacy.

2. *Causes of Action*

Celebrities are not the only people likely to have a valuable asset that they do not want to treat as a marketable commodity. Any person can find himself in this situation. For example, consider the situation of a person who, at the time of death, has a legal claim against a family member or friend. Assume that two brothers, Driver and Passenger, are in an automobile accident in which Passenger is injured due to Driver's negligence. If Passenger were to sue his brother, his claim would likely be successful and he might be awarded significant damages. If Driver had insurance (such that he was not going to be personally liable for the judgment), then Passsenger's decision whether to sue could be a purely economic decision in which Passenger the person would weigh the transaction costs of suing against the size and likelihood of the potential award. The greater the award, the more likely Passenger would be to sue. If, however, Driver did not have insurance and was subject to personal liability, then the calculation by Passenger would likely be very different. In that case, the decision whether to sue might not be an entirely economic one. Indeed, it is possible that the higher the potential award, the less likely Passenger would be to pursue the claim. Thus, for example, if Passenger suffered only minor injury and had a small claim for $200, he might be more likely to ask his brother for reimbursement than if he had a large claim which might drive his brother to bankruptcy. The refusal to sue his brother would reflect a judgment on the part of Passenger that family is more important than money.

Compare this to the situation where the Passenger died as a result of the injuries. Any claim that Passenger had for damages to which he had become entitled during his lifetime, *e.g.*, pain and suffering damages or medical expenses, is includible in his gross estate.[155] Now asume the heirs would like to follow Passenger's wishes by not recognizing the claim as a marketable commodity. However, the blunt tools of the estate tax system will include the cause of action as part of the gross estate valued based on the amount and likelihood of judgment. Assuming the claim is worth $1,000,000, the estate will be required to pay taxes on this amount of between $143,750 and $550,000. If the estate has insufficient assets with which to pay these taxes, the executors can be forced to sue in order to come up with the money to pay the tax.

3. *Body Parts*

Another property interest that raises similar concerns is the human body itself. Imagine a time in the near future when, as is true today, medical technology is at the stage where body parts are easily harvestable from dead bodies for use in the living. Moreover, the law and economics movement, so prevalent today, has become even more accepted, such that the sale of these body parts has become legal on the notion that the market will provide the best protection of people's interest in these rights. Some of these parts, like blood perhaps, may be priced relatively low reflecting their wide availability and others, like hearts, will be priced rather high to reflect their scarcity.

One could imagine that in this system, the sale of an entire body would generate a significant amount of money (even taking into account the increased availability of these assets that will come about as a result of creating the market). For example, let's assume that when someone dies, their body parts could be sold on the market for $1,000,000 (a conservative estimate if you think of it in terms of the sum of the parts; two eyes, two kidneys, a heart, etc.). What is the impact of our estate tax system in this world? If the heirs choose to maximize monetary wealth by disposing of all of the body parts for their highest market value, then under our current system, of the $1,000,000 realized on the sale, the heirs

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[155] Rev. Rul. 75-127, 1975-1 C.B. 297. Compare this to the treatment of wrongful death proceeds, which are not includible in decedent's gross estate because the wrongful death action cannot exist until after the decedent has died and thus the proceeds of such actions do not represent a property interest held by the decedent at the time of death. *Id.* at 298.

would need to pay somewhere between $143,750 and $550,000 (depending upon the amount of gifts made by the decedent during his life) in federal estate taxes.[156] However, what is problematic is that this tax liability is not limited to the situation where the heirs choose to sell the body. Rather, the liability exists even when the family refuses to sell the body parts. The mere opportunity to do so triggers the tax.

C. Recognition of Personal Property under Current Estate Tax System

Although I am advocating for a more explicit recognition of distinctions among property interests, there are ways in which our current estate tax system already recognizes this value. In particular, this is achieved through the provision that allows for the special use valuation of real estate used in a family farm or business. This provision was adopted by Congress in 1976 in order to enable heirs to continue operation of a farm or closely held business without needing to sell the property in order to pay the estate taxes. The legislative history explained the reason for the provision as follows:

> [T]he estate tax can impose acute problems when the principal asset of the estate is equity in a farm or small business. Because assets are valued at their "highest and best use" rather than on the specific use to which the assets are being put and because these assets are illiquid, family members have been forced to sell farms and small businesses in order to pay the estate tax. To deal with these problems, the bill allows farms (and other family businesses) to be valued at their value for farming use (or other small business use) when they remain in the family, rather than be valued at the speculative market value. Also, in these cases the bill extends the time for payment of estate tax liability. These changes are intended to preserve the family farm.[157]

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[156] I.R.C. § 2001 et seq. No income taxes would be due on the sale due to the fact that the heirs would receive the property with a basis equal to the properties' fair market value at the time of death. I.R.C. §§ 1014-15.

[157] H.R. Rep. No. 1380, 94th Cong., 2d Sess. 5, reprinted in 1976 U.S.C.C.A.N. 3356, 3359.

There are very strict rules for the application of this provision. In general, in order to be eligible for the relief this section offers the following requirements must be met:

1. The property must pass from the estate to a member of the decedent's immediate family;[158]

2. The decedent or a member of the decedent's family must have owned the property and personally participated in the operation of the farm and business for five of the eight years preceding the decedent's death;[159]

3. The real property must have been used as a farm or in a trade or business on the date of the decedent's death and for five out of eight years immediately prior to the decedent's death;[160]

4. The value of the property used in the farm or business must make up a significant portion of the decedent's estate.[161]

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[158] Referred to in the Code as a qualified heir. Eligible individuals include the decedent's spouse, ancestors, children, stepchildren; spouses and lineal descendents of those individuals; or a trust for the exclusive benefit of such persons. I.R.C. § 2032A(b)(1)(A)(ii), (e)(1), (2), (9) and (g).

[159] I.R.C. § 2032A(b). If the decedent was disabled or retired then the eight year period can be measured from the date on which the decedent became disabled or began receiving social security benefits. I.R.C. § 2032A(b)(4). The technical term for the required level of involvement is "material participation." The regulations provide that for purposes of meeting this requirement, "actual employment of the decedent (or of a member of the decedent's family) on a substantially full-time basis (35 hours a week or more) or to any lesser extent necessary personally to manage fully the farm or business in which the real property to be valued under section 2032A is used constitutes material participation." Reg. § 20.2032A-3(e). Material participation cannot be established by agents or employees. Reg. § 1.1402(a)-(4)(b)(5). This limitation restricts access to § 2032A to families who are personally involved in the business and excludes individuals who own farmland as a passive investment. Steven A. Zumbach, § *2032A—Special Use Valuation*, 445-2d Tax Mgmt. Est., Gifts & Tr. J. (BNA), at A-5 (1989).

[160] I.R.C. § 2032A(b).

[161] The value of the real and personal property used in the farm or business must make up at least 50% of the adjusted value of the decedent's adjusted gross estate and the qualifying real property must make up at least 25% of the adjusted value of the decedent's estate. I.R.C. § 2032A(b)(1)(A), (B). For purposes of this rule, adjusted value of the estate means the gross estate less indebtedness attributable to such property. I.R.C. § 2032A(b)(3).

5. The heirs must continue to own the farm or business for ten years after the date of the decedent's death and must personally participate in the operation of the farm or business for a significant portion of that time.[162]

The purpose of these requirements is to limit the provisions' protections to family farms or businesses that will continue to be operated by family members rather than to generally encourage investment in farmland or other property used in business. If the decedent or a member of the decedent's family was not personally and actively involved in the farm or business, this special valuation provision is not available. Similarly, if the heirs fail to continue to own the property or to personally participate then all or a portion of the estate tax saved by this special valuation provision is recaptured.[163] Although this provision is commonly understood as providing protection for farms, it is important to note that it only provides protection for some farms, namely those in which the decedent was personally and actively involved.

One way of understanding this provision is as providing protection for constitutive property. It recognizes that the identity of a person as a farmer depends upon his having a farm and respects the choice of the heirs to carry on this identity.

D. *Towards a More Nuanced Approach to Wealth*

In its current form, the estate tax is a crude tax that uses blunt instruments. However, it can be changed. Just as the income tax system has refused to impose a tax based on a comprehensive definition of income, so the wealth tax can begin to employ a more nuanced approach to wealth. The problem raised by personal property is a complex one and is not likely to be solved by any quick fix. My goal in this section is to review the contours of the problem

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[162] I.R.C. § 2032A(c)(6) requires that for any eight year period ending after the date of the decedent's death, there cannot be periods aggregating more than three years during which the decedent or a member of decedent's family in the pre-death period or the qualified heir or members of the qualified heir's family in the post-death period, did not materially participate in the operation of the farm or other business. Zumbach, *supra* note 159, at A-29.

[163] I.R.C. § 2032A(c).

and consider the advantages and disadvantages of some possible solutions.

The problem raised by accommodating personal property is twofold. The first is that any solution must be expansive enough to encompass people's varying relationship to property. That is, it must recognize that the world is made up of Howard Sterns and J.D. Salingers, that most people fall somewhere in between, and that even Howard Stern probably has property interests which he does not view as marketable commodities. The second issue is that in order to avoid creating another loophole in an already loophole-ridden tax, any solution must be restrictive enough that it is not used to merely opt out of the tax system. In this section I look at some possible ways of addressing the problem.

One approach to this problem would be to look at substantive law. The estate tax piggy-backs on the substantive property law in each state. Therefore, one way of addressing this issue is to resist either the commodification or the descendibility of these highly personal interests. Indeed, some states have specifically refused to treat the right of publicity as a property right separate from the personal right of privacy[164] and other states have declined to make the right descendible.[165]

Disallowing the creation or even the descendibility of these highly personal property interests would solve the problem raised by the estate tax. However, to change substantive law to address a tax problem is highly problematic. The substantive law was developed to accommodate those who choose to treat their name and likeness as a marketable commodity. To deny those rights in order to avoid estate tax problems for those who choose not to commodify their celebrity, is to deny recognition of nuances in wealth. The fact that the estate tax as it currently stands cannot accommodate people's individual decision not to treat a property interest as a commodity should not force changes in substantive property law denying everyone the right to treat these interests as commodities.

Another approach, suggested by the treatment of the family farm, would be to provide a special statutory exception for the right

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[164] *See supra* note 60.

[165] *See supra* notes 58-63 and accompanying text.

of publicity which would enable the heirs to elect to value the right of publicity at its actual use value rather than at its "highest and best use." Thus, if J.D. Salinger's heirs wanted to respect his wishes to not treat his name as a marketable commodity, they could make an election to value his name in accordance with its actual non-market use (presumably the fair market value would then be close to zero). If they later changed their minds and started to market the name, then they could be subject to a recapture tax. Although this solution would present a short term solution to the particular problem raised by the right of publicity, it is unsatisfactory because it fails to recognize that the right of publicity is just part of the larger problem of taxing highly personal interests. With the proliferation of property interests that is occurring, the necessary legislation of exclusions could not realistically be expected to occur.

The method that would appear to provide the best solution would be to provide a mechanism through which people could essentially deny the market value of a constitutive property interest. This would accommodate people's varying relationships to their property interests. Thus, the person who wants to give her heirs the ability to sell her clothes could do so, while the person who finds the thought of her clothes being sold off at auction repugnant could be accommodated as well. How would these wishes be relayed? One obvious way is to enable a person to put a provision in her will restricting the sale of different property interests. Although this mechanism would address the problem for some, it is inappropriate to require it of everyone. The nature of these personal property interests is such that people will frequently not even think of them as property interests raising tax problems. Thus, if a provision in a will was required, this would limit the protection to the few sophisticated individuals who were aware of this problem. The better solution would be one which would also enable the personal representative of the decedent to make the election not to treat the property interest as a marketable commodity.

One risk that this proposal raises is that it would be used by taxpayers to opt out of estate taxes with respect to all of their property by merely claiming that they do not desire to treat it as a marketable commodity. In order to address this concern there would need to be some mechanism through which any subsequent sale would either be prohibited or subject to a recapture tax. To facilitate enforcement, these protections could be limited to those property interests that have a limited term of marketability. For example, the right of publicity is a statutory right that only lasts for a limited period of time after the decedent's death. Similarly a cause of action can only be brought within the statute of limitations. This would not provide protections for most items of tangible property, but this limitation would have the advantage of reducing the likelihood of this provision eviscerating the estate tax.

VI. CONCLUSION

The proper scope of the estate tax system has received scant attention to date. As property interests have proliferated, so too have the kinds of interest subject to the tax. In this article I have used the estate tax consequences of the right of publicity as a window through which to observe the ways in which the development of new property interests has created challenges for the estate tax system. In particular, the failure to recognize distinctions among property interests imposes unique hardships on those who choose not to treat highly personal property interests as commodities. Other areas of the law have given preference to the relationship between people and personal property interests; it is time that these changes occur in estate tax law as well.